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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 176.

GEORGE H. N. LUHRS, APPELLANT,

vs.

WILLIAM A. HANCOCK, LILLY B. HANCOCK, AND THOMAS W. PEMBERTON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JANUARY 8, 1900.

(17,696.)

(17,596.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Complaint	1	1
Summons	2	2
Answers	4	3
Stipulation as to answer	5	3
Affidavit for leave to make additional parties	5	4
Order bringing in Pemberton as party	6	4
Amended complaint	7	5
Amended summons	9	6
Answer of Hancocks	10½	7
Answer of Pemberton	11	8
Amended answer of Pemberton	13	9
Findings of fact and conclusions of law	20	12
Judgment	22	13
Motion for new trial	24	15
Memorandum of costs and disbursements	25	15
Judgment-roll	26	16
Order setting cause for trial	27	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1900.

	Original.	Print
Order transferring cause to Judge Sloan	27	16
Order setting cause for trial	28	16
Order making Pemberton party	28	17
Order continuing cause	28	17
Order assigning cause to Judge Sloan	29	17
Order beginning trial	29	17
Order submitting on briefs	30	18
Order for judgment	31	18
Reporter's transcript of evidence	32	19
Evidence offered, &c	33	19
Testimony of George H. N. Luhrs	37	22
George H. N. Luhrs (recalled)	39	22
William Christy	40	23
Plaintiffs rest	42	24
Testimony of George H. N. Luhrs	42	25
Wm. A. Hancock	45	26
T. W. Pemberton	59	34
Case closed	61	36
Reporter's certificate	62	36
Clerk's certificate to transcript	64	37
Plaintiff's Exhibit A—Record in case of Herrick & Co. *vs.* Hancock *et al.*, No. 533	65	37
Complaint	65	37
Mortgage, November 10, 1883	72	41
Mortgage, December 17, 1883	74	42
Summons	77	45
Summons	79	46
Demurrer	81	47
Answer	82	48
Demurrer of Tweed	86	50
Reply	87	51
Demurrer to reply	90	53
Supplemental complaint	91	53
Answer	94	55
Judgment of foreclosure	95	56
Plaintiff's Exhibit 2—Execution in case No. 533, Herrick & Co. *vs.* Hancock *et al.*	99	58
3—Sheriff's return of execution in case No. 533, Herrick & Co. *vs.* Hancock *et al.*	101	59
4—Sheriff's certificate of sale in case No. 533, Herrick & Co. *vs.* Hancock *et al.*	102	60
5—Sheriff's deed to Geo. H. N. Luhrs, February 4, 1893	103	61
Defendants' Exhibit No. 1—Sheriff's deed to Geo. H. N. Luhrs, January 4, 1893	107	63
No. 2—Deed of Wm. A. Hancock to Lillie B. Hancock, February 27, 1886	111	66
No. 3—Mortgage of Wm. A. Hancock *et ux.* to Robert Allstatter, March 21, 1892	113	67
No. 3½—Promissory note of Wm. A. Hancock *et ux.* to Robert Allstatter, March 21, 1892	116	69

	Original.	Print
Defendants' Exhibit No. 4—Record in case of Allstatter *vs.* Hancock *et al.*, No. 1927	117	70
Complaint	117	70
Summons	121	73
Answer	122	73
First amended complaint	125	75
Reply	130	78
Answer of Pemberton	131	79
Reply	133	80
Amended reply	134	81
Amended reply	135	81
Answer to amended complaint	136	82
Judgment	138	83
Certificate to judgment-roll	141	85
Answer	142	86
No. 5—Order of sale in case of Allstatter *vs.* Hancock, No. 1927	143	86
No. 5½—Sheriff's certificate of sale in case of Allstatter *vs.* Hancock, No. 1927	146	89
Order setting cause for hearing	148	90
Order submitting cause	148	90
Judgment	148	90
Notice of appeal, &c	155	94
Order staying remittitur	155	94
Petition of appeal	156	94
Order allowing appeal	156	94
Bond on appeal	157	95
Objections and exceptions to the admission and rejection of evidence	159	96
Statement of facts	163	98
Assignment of errors	165	100
Clerk's certificate	170	102
Citation	171	103
Acceptance of service of citation	172	103

a *Transcript of the Record in Case of Luhrs vs. Wm. A. and Lilly B. Hancock and T. W. Pemberton.*

Appealed to the supreme court of the Territory of Arizona January 9th, A. D. 1899.

1 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEO. H. N. LUHRS, Plaintiff, *vs.* WILLIAM A. HANCOCK and LILLY B. Hancock, Defendants.	# 2531. Complaint. Filed Feb'y 1st, 1896, at 4 o'clock p. m. J. E. Walker, Clerk.

The complaint of the plaintiff, who appears herein by Thos. Armstrong, Jr., his attorney, shows to the court:

That the parties hereto are residents of the county of Maricopa, Territory of Arizona.

That on the third day of February, 1893, the plaintiff was seized in fee and entitled to the possession of those certain premises situate, lying, and being in the county of Maricopa, Territory of Arizona, known and described as follows, to wit: Lots numbered fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block numbered seventy-seven (77), of the city of Phœnix, according to the plat thereof made by W. A. Hancock and recorded in the office of the county recorder of Maricopa county aforesaid.

That while the plaintiff was so seized the defendants afterward, on the 4th day of February, 1893, and without title or right entered into possession of the said premises, and from thence to the present time and now unlawfully withhold the possession thereof from the plaintiff, to his damage in the sum of forty-five hundred dollars ($4,500.00.)

2 That the value of the rents, issues, and profits of said premises from the 4th day of February, 1893, and while the plaintiff has been excluded therefrom by the defendants is the sum of twenty-five hundred dollars ($2,500.00).

Wherefore the plaintiff prays judgment against the defendants for the recovery of the possession of the said premises and for the sum of forty-five hundred dollars ($4,500.00), damages for the withholding of the possession thereof, and also for the sum of twenty-five hundred dollars ($2,500.00), the value of the rents, issues, and profits of said premises, besides the costs of this action.

Dated at Phœnix, February 1st, 1896.

THOS. ARMSTRONG, JR.,
Attorney for the Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEO. H. N. LUHRS, Plaintiff, *vs.* WILLIAM A. HANCOCK and LILLY B. Hancock, Defendants.	Summons. Filed Feb'y 4th, 1896. J. E. Walker, Clerk, by C. H. Knapp, Deputy Clerk.

Action brought in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county and the complaint filed in said Maricopa county, in the office of the clerk of said district court.

In the name of the Territory of Arizona to William A. Hancock and Lilly B. Hancock, defendant-, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the dis-
3 trict court of the third judicial district of the Territory of Arizona in and for Maricopa county, and answer the complaint therein filed with the clerk of this said court at Phœnix, in said county, within ten days after the service upon you of this summons if served in this said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and seal of the district court of the third judicial district of the Territory of Arizona in and for Maricopa county this 1st day of February, A. D. 1896.

J. E. WALKER,
[COURT SEAL.] *Clerk of said District Court.*

OFFICE OF THE SHERIFF OF THE COUNTY OF MARICOPA.

I hereby certify that I received the within summons on the 1st day of February, A. D. 1896, at the hour of 4 p. m., and personally served the same on the 1st day of February, A. D. 1896, on William A. Hancock, *they* being — the said defendants named in said summons, by delivering to him, the said defendant, at the county of Maricopa, Arizona, a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons.

Dated this 1st day of February, A. D. 1896.

L. H. ORME, *Sheriff.*
By J. E. BOYD,
Deputy Sheriff.

Fees.

Service	$1.50
Copies	1.20
Travel, — miles	.30
Total:	$3.00

4 In Third District Court, Maricopa County, Arizona Territory.

GEORGE H. N. LUHRS, Plaintiff, *against* WILLIAM. A. HANCOCK and LILY B. Hancock, Defendants.	No. 2531. Answers. Service Received of a Copy of the Within this 25 Day of Feb'y, 1896. Thos. Armstrong, Jr., Attorney for P'ff. Filed Feb'y 25th, 1896. J. E. Walker, Clerk, by C. H. Knapp, Deputy Clerk.

The defendant William A. Hancock, answering for himself alone and not for his codefendants, — each and every allegation in the plaintiff's complaint contained, and asks that he be hence dismissed with costs.

FITCH & CAMPBELL,
Att'ys for D'f'd't W. A. Hancock.

The defendant Lily B. Hancock, answering for herself alone and not for her codefendant, denies each and every allegation in the plaintiff's complaint contained.

Defendant, for further and separate answer, avers that she is and ever since the 17th day of February, 1886, she has been the owner and in possession in her sole right and as her separate property, acquired by her by gift, of the premises described in the complaint, and that she has been in the quiet, peaceable, and adverse possession of said lands and premises under title as against plaintiff and as against the whole world ever since the 17th day of February, 1886, continuously; and defendant avers that this action is barred by the provisions of section 2297 of the Revised Statutes of Arizona.

And, further answering, defendant avers that she is not guilty of the matters and things in plaintiff's complaint alleged.

Wherefore defendant Lily B. Hancock asks to be hence dis-
5 missed with costs.

FITCH & CAMPBELL,
Att'ys for Defendant Lily B. Hancock.

In the District Court of the Third Judicial District of Arizona Territory in and for Maricopa County.

GEORGE H. N. LUHRS, Pl'tiff, *vs.* WM. A. HANCOCK and LILLIE B. Hancock, Def'ts.	No. 2531. Stipulation. Filed March 30th, 1896. J. E. Walker, Clerk, by C. H. Knapp, Deputy Clerk.

Stipulated that defendants have ten days' additional time in which to answer the plaintiff's complaint filed herein.

Feb'y 10th, 1896.

THOS. ARMSTRONG, JR.,
Att'y for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEO. H. N. LUHRS, Plaintiff, *vs.* WM. A. HANCOCK and LILLY B. Hancock, Defendants.	Affidavit for Leave to Make Additional Parties. Filed Jan'y 4th, 1898. Edwin S. Gill, Clerk, by C. H. Knapp, Deputy Clerk.

TERRITORY OF ARIZONA, *County of Maricopa,* } ss:

Geo. H. N. Luhrs, being first duly sworn, on his oath says he is the plaintiff in the above-entitled action.

That since the commencement of said action, to wit, on the — day of March, 1896, one Thos. W. Pemberton has entered upon
6 the lands and premises described in the plaintiff's complaint in this action under the defendants, Wm. A. Hancock and Lilly B. Hancock, and without right or title, and has from said last-mentioned date to the present and doth now unlawfully withhold the possession thereof from this plaintiff, to his damage in the sum of $5,000; that said Thos. W. Pemberton is a necessary and proper party to this action, without whose presence full and complete justice cannot be done in this cause, and affiant prays that an order may be made and entered making said Thos. W. Pemberton a party defendant herein, and that the summons herein may be amended accordingly, and that the plaintiff have leave to so amend his complaint in accordance with the facts and as he shall be advised is necessary in the premises.

GEO. H. N. LUHRS.

Subscribed & sworn to before me this 4 day of January, 1898.

THOS. ARMSTRONG, JR.,
Notary Public, Ariz.

[NOTARY SEAL.]

My commission expires March 21, 1901.

District Court, 3d Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEO. H. N. LUHRS, Plaintiff, *vs.* WM. A. HANCOCK and LILLY B. HANcock, Defendants.	Order Bringing in Pemberton as Party. Filed Jan'y 4th, 1898. Edwin S. Gill, Clerk, by C. H. Knapp, Deputy Clerk.

On reading and filing the duly verified petition of Geo. H. N. Luhrs, the plaintiff above named, and it appearing necessary
7 and proper, it is ordered that Thos. W. Pemberton be made a party defendant in the above-entitled action; that the summons issued therein be amended accordingly, and that the plaintiff have leave to so amend his complaint as he may be advised and the

mended summons and complaint be served upon said Thos. W. 'emberton.

Dated —.

By the court:

RICHARD E. SLOAN, *Judge.*

n the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEORGE H. N. LUHRS, Plaintiff, *vs.* WILLIAM A. HANCOCK and LILLY B. Hancock, Defendants.	No. 2531. Amended Complaint. Filed March 4, 1898, at 2.20 o'clock p. m. Edwin S. Gill, Clerk.

Comes now the plaintiff, George H. N. Luhrs, by his attorneys, Hamilton & Armstrong, and by leave of the court first had and obained makes and files this amended complaint in the above-entitled ction against the defendants above named and also against Thomas V. Pemberton, impleaded as a defendant herein by the order of the ourt, and shows that the parties hereto are residents of the county f Maricopa and Territory of Arizona; that on the 4th day of ebruary, 1893, the plaintiff was seized in fee and entitled to the ossession of those certain premises situate, lying, and being n the county of Maricopa and described as follows, to wit: ots numbered fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block numbered seventy-seven (77) of the city of Phœnix, according to the plat thereof made by W. A. Hancock and recorded in the office of the county ecorder of Maricopa county aforesaid, and is still so seized in fee nd entitled to the possession of said premises; that while the plainiff was so seized the defendants, W. A. Hancock and Lilly B. Hancock, on the 4th day of Feb., 1893, without right or title, entered nto possession of the said premises, and from thence to the commencement of this action and until the 4th day of March, 1896, nlawfully withheld the possession thereof from this plaintiff, to his damage in the sum of $4,500; that the value of the rents, issues, nd profits of said premises from the 4th day of Feb., 1893, to the th day of March, 1896, and while the plaintiff was excluded therefrom, as aforesaid, by the defendants, W. A. Hancock and Lilly B. Hancock, is the sum of $2,500.

That since the commencement of this action, to wit, on the 4th day of March, 1896, the said Thomas W. Pemberton, claiming title o said premises under said defendants, W. A. Hancock and Lilly B. Hancock, and by conveyance from them, unlawfully entered into ossession of said premises under said W. A. Hancock and Lilly B. Hancock without lawful right or title, and has ever since and does ow unlawfully withhold the possession thereof from this plaintiff, o his damage in the sum of $4,500.

That the value of the rents, issues, and profits of said premises rom the 4th day of March, 1896, to the present date, and while the

plaintiff has been excluded therefrom by the said Thomas W. Pemberton, is the further sum of $2,000.

Wherefore the plaintiff prays judgment against the said W. A. Hancock, Lilly B. Hancock, and Thomas W. Pemberton for
9 the recovery of the possession of the said premises and for the sum of $4,500, damages for the withholding of the possession thereof, and also for the sum of $2,500 against the said W. A. Hancock and Lilly B. Hancock for value of the rents, issues, and profits of said premises from the 4th day of Feb., 1893, to the 4th day of March, 1896, and against the said Thomas W. Pemberton for the sum of $2,000, being the value of the rents, issues, and profits of said premises from the 4th day of March, 1896, and also prays judgment against said W. A. Hancock, Lilly B. Hancock, and Thomas W. Pemberton for the costs of this action.

Dated this 3d day of March, 1898, at Phœnix.

HAMILTON & ARMSTRONG,
Attorneys for Plaintiff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEO. H. N. LUHRS, Plaintiff,
vs.
WM. A. HANCOCK and LILLY B. HANCOCK, Defendants.
} Amended Summons.

Action brought in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county and the complaint filed in said Maricopa county, in the office of the clerk of said district court. Filed March 4th, 1898. Edwin S. Gill, clerk, by C. H. Knapp, deputy clerk.

In the name of the Territory of Arizona to Thomas W. Pemberton and to W. A. Hancock and Lilly B. Hancock, defendants, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Arizona
10 in and for Maricopa county, and answer the amended complaint therein filed with the clerk of this said court, at Phœnix, in said county, within ten days after the service upon you of this summons, if served in this said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, *ir* in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and the seal of the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, this 4 day of March, A. D. 1898.

EDWIN S. GILL,
[COURT SEAL.] *Clerk of said District Court.*

OFFICE OF THE SHERIFF OF THE COUNTY OF MARICOPA.

I hereby certify that I received the within summons on the 4th day of March, A. D. 1898, at the hour 2.40 p. m., and personally served the same on the 4th day of March, A. D. 1898, on Thomas W. Pemberton, being the defendant named in said summons, by delivering to him, the said Thomas W. Pemberton, in the city of Phœnix, county of Maricopa, a copy of said summons, to which was attached a true copy of the amended complaint mentioned in said summons.

Dated this 4 day of March, A. D. 1898.

L. H. ORME, *Sheriff*,
By J. E. BOYD,
Deputy Sheriff.

Fees.

Service	$1.50
Copies	.60
Travel, — miles	.30
Total	$2.40

10½ In the District Court of the Third Judicial District of Arizona Territory in and for Maricopa County.

GEORGE H. N. LUHRS, Plaintiff,
vs.
WILLIAM A. HANCOCK, LILLY B. HANCOCK, and Thomas W. Pemberton, Defendants.

No. 2531. Answer. Filed March 12, 1898, at 2.10 o'clock p. m. Edwin S. Gill, Clerk.

Come the defendants William A. Hancock and Lilly B. Hancock and for answer to plaintiff's amended complaint deny all and singular the allegations therein contained, and say that they are not guilty of the wrongs and trespasses therein alleged against them.

And the said defendants, further answering, aver that the defendant Lilly B. Hancock is and at all the times hereinafter named was the wife of the defendant William A. Hancock, and residing with her husband upon the premises described in the amended complaint, and that ever since the 17th day of February, 1886, she has been the owner in her sole right and as her separate property acquired by her by gift of the said premises, and that she has been in the
11 quiet, peaceable, continuous, and adverse possession of said premises under title as against plaintiff and the whole world for more than nine years prior to the date of the commencement of this action; and defendants allege that the cause of action set forth in the plaintiff's amended complaint is barred by the provisions of section 2297, Revised Statutes of Arizona.

Wherefore defendants pray that plaintiff take nothing hereby, and that they have their costs.

JOSEPH CAMPBELL,
Attorney for Defendants.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEORGE H. N. LUHRS, Plaintiff, *vs.* WILLIAM A. HANCOCK and LILLY B. Hancock, Defendants.	No. 2531. Answer of Pemberton. Filed March 14, 1898, at 9.50 o'clock a. m. Edwin S. Gill, Clerk.

Now comes Thomas W. Pemberton, one of the defendants in this cause, and for answer to the amended complaint filed against him on the 4th day of March, A. D. 1898, and being as to him the original complaint against this defendant, demurs to said
12 amended complaint and alleges as a ground of demurrer that said amended complaint does not state facts sufficient to constitute a cause of action against him or against any of the defendants to said action.

Wherefore this defendant prays judgment on his said demurrer; that said action be dismissed, and that he have and recover of the plaintiff his costs and disbursements herein.

In case this defendant's demurrer should be overruled and this defendant required to answer over, this defendant, further answering the amended complaint herein, alleges that this action was commenced against him on the 4th day of March, 1898; that said cause of action was not commenced against this defendant within three years from the time said cause of action is first alleged to have accrued to the plaintiff.

That this defendant became the owner of and entitled to the possession of said premises described in the amended complaint on or about the 14th day of February, 1895; that this defendant obtained title to said premises from the defendant Lilly B. Hancock, and the said defendant, Lilly B. Hancock, has been ever since on or about the 17th day of February, 1886, the owner of said premises as her sole and separate property and in the quiet, peaceable, and adverse possession of said lands and premises under a regular deed of conveyance conveying to her said title to said premises as her sole and separate property as against the plaintiff in this action and all the world except this defendant, to whom she conveyed her title aforesaid long prior to the commencement of this action; and this defendant alleges that this action is and was at the time of its commencement against said defendant, Lilly B. Hancock, and at
13 the time of its commencement against this defendant barred by the statute of limitation, to wit, section 2297, Revised Statutes of Arizona for 1887.

Wherefore this defendant prays judgment that said action be adjudged to be barred as against this defendant.

This defendant, further answering the amended complaint of the plaintiff herein, alleges that he is not guilty of the matters and things alleged in plaintiff's amended complaint herein.

Wherefore this defendant prays the judgment of this court that plaintiff's action as to him be dismissed, and he have and recover of the plaintiff his costs and disbursements incurred herein, and for

such other and further relief as to the court may seem just and equitable in the premises.

C. F. AINSWORTH,
Attorney for the Defendant Thos. W. Pemberton.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEORGE H. N. LUHRS, Plaintiff, *vs.* WILLIAM A. HANCOCK and LILLY B. Hancock, Defendants.	No. 2531. Amended Answer of Def't Pemberton. Filed April 8th, 1898. Edwin S. Gill, Clerk.

Now comes Thomas W. Pemberton, one of the defendants in this cause, and for this his amended answer to the amended complaint filed against him on the 4th day of March, A. D. 1898, and being as to him the original complaint against this defendant, demurs to said amended complaint and alleges as a ground of demurrer that said amended complaint does not state facts sufficient to con-
14 stitute a cause of action against him or against any of the defendants to said action.

Wherefore this defendant prays judgment on his said demurrer; that said action be dismissed, and that he have and recover of the plaintiff his costs and disbursements herein.

In case this defendant's demurrer should be overruled and this defendant required to answer over, this defendant, further answering the amended complaint herein, alleges that this action was commenced against him on the 4th day of March, 1898; that said cause of action was not commenced against this defendant within three years from the time said cause of action is first alleged to have accrued to the plaintiff.

That this defendant became the owner of and entitled to the possession of said premises described in the amended complaint on or about the 14th day of February, 1895; that this defendant obtained title to said premises from the defendant Lilly B. Hancock, and the said defendant, Lilly B. Hancock, has been ever since on or about the 17th day of February, 1886, the owner of said premises as her sole and separate property and in the quiet, peaceable, and adverse possession of said lands and premises under a regular deed of conveyance conveying to her said title to said premises as her sole and separate property as against the plaintiff in this action and all the world except this defendant, to whom she conveyed her title aforesaid long prior to the commencement of this action; and this defendant alleges that this action is and was at the time of its commencement against said defendant, Lilly B. Hancock, and at the time of its commencement against this defendant barred by the statute
15 of limitation, to wit, section 2297, Revised Statutes of Arizona for 1887.

Wherefore this defendant prays judgment that said action be adjudged to be barred as against this defendant.

This defendant, further answering the amended complaint of the

plaintiff herein, alleges that he is not guilty of the matters and things alleged in plaintiff's amended complaint herein.

This defendant further alleges that heretofore, to wit, on or about the 2nd day of September, 1885, this plaintiff, George H. N. Luhrs, and his coplaintiff, Newell Herrick, brought suit in this court against the defendants William A. Hancock and Lilly B. Hancock, known as case No. 533 on the registry of actions in this court; that said action was brought for the purpose of recovering of the said defendant, William A. Hancock, on a certain note executed by him to the firm of Gus Ellis & Co.; which said note in said complaint is alleged to be secured by a mortgage executed at the date of said note by the said defendant, William A. Hancock, on four of the lots described in plaintiff's complaint herein; that in said action the said defendants, William A. Hancock and Lilly B. Hancock, filed an answer, alleging that all of the property described in plaintiff's complaint herein was at the time of the execution of said mortgage by the said William A. Hancock the homestead of the said William A. Hancock, and that by reason thereof the said mortgage was as to said property absolutely void; that in said action the issue was tried between this plaintiff and the said defendants, William A. Hancock and Lilly B. Hancock, as to whether said property was the homestead of the said William A. Hancock and Lilly B. Hancock, his wife, at the time of making said mortgage and at the time of the commencement of said action; that upon said issue so raised in
16 said action, as aforesaid, this court decided and determined, and rendered its judgment accordingly; that said lands described in this complaint were at the time of making said martgage, and at the time of the commencement of said action, the homestead of the said defendants, William A. Hancock and Lilly B. Hancock, and that said decision is still in force and never has been reversed; that be reason of said decision, as aforesaid, the question as to whether said lots described in the complaint herein were at the time of making said mortgage, and at the time of the commencement and trial of said action, the homestead of the said defendants, William A. Hancock and Lilly B. Hancock, became and is *res judicata* as to that question, as between the plaintiff to this action and the defendant herein.

This defendant, further answering the amended complaint of the plaintiff herein, alleges that said plaintiff has never at any time been in possession of said property or any part thereof.

That heretofore, to wit, on or about the 17th day of December, 1883, the said defendants, William A. Hancock and Lilly B. Hancock, were in possession of all of said property, then claiming and occupying said property as their homestead.

That on or about the 17th day of December, 1883, said defendants executed to this plaintiff, George H. N. Luhrs, and his copartner, Newell Herrick, a mortage on said property for the sum of $1,602.90.

That thereafter, to wit, on or about the 17th day of February, 1886, and while said defendants were in possession of said property, occupying the same as their homestead, the said defendant, Wil-

liam A. Hancock, in consideration of love and affection, gave
17 said property to his said wife, Lilly B. Hancock, and conveyed the same by proper deed of conveyance, as her sole and separate property, and that at the time of said conveyance said property was the homestead of said defendants, and was subject to no debt or incumbrance or liability of the said William A. Hancock except the mortgage hereinbefore mentioned as having been executed by the said defendants to this plaintiff and his copartner, Newell Herrick.

That thereafter, to wit, on or about the 5th day of May, 1892, the said Newell Herrick and George H. N. Luhrs recovered a judgment against the said William A. Hancock and Lilly B. Hancock, foreclosing the said mortgage aforesaid for the amount of $2,203.37, together with $222.30 attorneys' fees and $58.45 costs in this court, known as case No. 533.

That thereafter, to wit, on the 21st day of March, 1892, the said defendant, Lilly B. Hancock, and her husband, William A. Hancock, for the purpose of paying off said encumbrance upon the property of the said defendant, Lilly B. Hancock, aforesaid, borrowed of one Robert Allstatter the sum of $2,600.00, and to secure the payment of the same the said defendants, Lilly B. Hancock and William A. Hancock, executed and delivered to the said Robert Allstatter their note for said sum, payable two years after the date thereof, with interest at 1 % per month, and to secure the payment of the same executed a mortgage in due form to the said Robert Allstatter on all of the property described in plaintiff's amended complaint herein.

That thereafter, the said defendants neglecting to pay said note when due, said Robert Allstatter brought suit in this court
18 to foreclose said mortgage against said property aforesaid, and thereafter, to wit, on the 10th day of May, 1894, a judgment was rendered in this court in favor of the said Allstatter and against these defendants, William A. Hancock and Lilly B. Hancock, for the sum of $3,107.50, together with $148.10 attorneys' fees and $30.15 costs, together with the foreclosure of said mortgage lien securing the payment of said note aforesaid.

That thereafter an order of sale was issued on said judgment, and said property was thereafter, pursuant to law, sold by the sheriff of Maricopa county to this defendant for the sum of $3,511.80 and a certificate of sale issued to him on said sale dated August 11th, 1894; that thereafter, to wit, on or about the 14th day of February, 1895, said sale being unredeemed, the sheriff of Maricopa county issued to this defendant a deed to said property, and that thereupon this defendant went into possession of said property, has ever since been and now is in notorious and adverse possession as against all the world.

That this defendant has since the purchase of said property, as aforesaid, paid taxes against said property and has made valuable improvements upon said property, placing buildings thereon, building sidewalks around said property, thereby increasing the value of said property; that the value of said improvements made by this

defendant, including taxes and purchase-money he has paid for the same, will amount to at least the sum of $12,000.00.

This defendant, Thomas W. Pemberton, for a cross-complaint against the plaintiff, George H. N. Luhrs, alleges—

That all the parties to this action are residents of Maricopa county, Territory of Arizona.

19 That this defendant is now and was at the time of the commencemint of this action against him the owner in fee and in possession of the property described in plaintiff's complaint.

That the said plaintiff, George H. N. Luhrs, claims to have some estate or interest in said premises adverse to this *plaintiff*.

This defendant further alleges that the said plaintiff, George H. N. Luhrs, is without any right whatever, and that said plaintiff has no right, title, or interest whatever in said lands or premises or any part thereof.

Wherefore this defendant prays the judgment of this court that plaintiff's action as to him be dismissed, and that the plaintiff be required to set forth the nature of his claims, and that all adverse claims of the plaintiff may be determined by the decree of this court, and that by said decree it be declared that the plaintiff has no interest or estate *or* in or to the said lands or premises, and that the title of this defendant to said premises is good and valid, and that plaintiff be declared forever debarred from asserting any claim whatever in or to said lands or premises adverse to this defendant; and for such other and further relief as to this honorable court may seem agreeable to equity, and that this defendant do have and recover of the plaintiff his costs and disbursements incurred herein.

C. F. AINSWORTH,
Attorney for Defendant Thos. W. Pemberton.

20 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEORGE H. N. LUHRS, Plaintiff, *vs.* WILLIAM A. HANCOCK and Lilly B. Hancock and Thomas W. Pemberton, Defendants.	Before the Hon. R. E. Sloan, Presiding Judge. Findings of Fact and Conclusions of Law. Filed October 1st, 1898, at 9.30 o'clock a. m. Edwin S. Gill, Clerk, by C. H. Knapp, Deputy.

This cause coming regularly on for trial in the court aforesaid, before the Hon. R. E. Sloan, presiding judge, without a jury, at the May, A. D. 1898, term of said court, and the parties to said action appearing in person and by their attorneys and presenting to the court their evidence to sustain the allegations of their respective pleadings, and the attorneys for the respective parties hereto having presented to the court full and complete argument on their printed briefs in said cause, and the court, having taken said cause under advisement and being fully and sufficiently advised in the premises, finds the following facts and conclusions of law:

Findings of Fact.

The court finds that all of the parties to this action are residents of Maricopa county, Arizona Territory.

2.

The court finds that the said defendants, William A. Hancock and Lilly B. Hancock, were on the 27th day of February, 1886, the owners of the property described in plaintiff's complaint herein, to wit, lots fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), in block seventy-seven (77), of the city of Phœnix,
21 Arizona, and that said property was then and had been for a long time prior thereto the homestead of said defendants, William A. Hancock and Lilly B. Hancock.

That on said 27th day of February, 1886, the said defendant, William A. Hancock, in consideration of love and affection and as a settlement of a portion of his property on his wife, the defendant Lilly B. Hancock, conveyed to his said wife, Lilly B. Hancock, said property, which deed of conveyance was on the 6th day of March, 1886, duly recorded in the office of the county recorder of Maricopa county, in volume 12 of Deeds, page 359 thereof; that said conveyance did not impair the claims of any existing creditors, and that such conveyance and settlement was not intended by the said defendant, William A. Hancock, as a cover to future schemes or fraud; that thereupon the title to said property became and was vested in the said defendant, Lilly B. Hancock, as her sole and separate property.

3.

That thereafter said defendants, William A. Hancock and Lilly B. Hancock, executed a mortgage on said property to one Robert Alstatter; that thereafter said mortgage was foreclosed, said property sold on said foreclosure sale and bid in by the defendant herein, Thomas W. Pemberton, and thereupon the said Thomas W. Pemberton entered into possession of said property, and was at the time of the commencement of this action against him in possession of said property, claiming to be the owner thereof in fee under and by virtue of said mortgage and the foreclosure proceedings had thereon.

22 *Conclusions of Law.*

As conclusions of law the court finds that the plaintiff, George H. N. Luhrs, did not have at the time of the commencement of this action any right, title, interest, or claim in or to the property described in the complaint herein or any part thereof.

That the said defendant, Thomas W. Pemberton, was at the time of the commencement of this action and is now the owner in fee-simple of all of said property.

That the said defendant, Thomas W. Pemberton, should have judgment against the plaintiff, George H. N. Luhrs, declaring his

title in said premises good and valid and forever debarring said plaintiff from asserting any claim whatever in or to said lands and premises adverse to the said defendant, Thomas W. Pemberton, and for his costs and disbursements incurred herein, and that the said defendants, William A. Hancock and Lilly B. Hancock, should have judgment against the plaintiff for their costs and disbursements incurred herein.

Oct. 1st, 1898.

RICHARD E. SLOAN, *Judge.*

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

Before the Hon. R. E. Sloan, presiding judge.

GEORGE H. N. LUHRS, Plaintiff, *vs.* WILLIAM A. HANCOCK and LILLY B. Hancock and Thomas W. Pemberton, Defendants.	Judgment. Filed October 1st, 1899, at 9.30 o'clock a. m. Edwin S. Gill, Clerk, by C. H. Knapp, Deputy. Entered in Judgment Book "F," page 372.

23 This cause coming on regularly to be heard before the court without a jury, the Hon. R. E. Sloan presiding, and the parties to said action having appeared in person and by their attorneys and presented to the court their testimony to sustain the allegations of their respective pleadings, and attorneys for the respective parties to said action having submitted said cause upon the testimony and the printed briefs, and the court having taken said cause under advisement and having made and rendered its findings of fact and conclusions of law herein, now, therefore, it is by the court—

Considered, ordered, and adjudged that the defendant Thomas W. Pemberton is and was at the time of the commencement of this action the owner and entitled to the possession of the property described in the plaintiff's complaint herein, to wit, lots fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block number seventy-seven (77), in the city of Phœnix; that the said George H. N. Luhrs, plaintiff herein, has no right, title, or interest in or to said property or any part thereof, and that the said George H. N. Luhrs be, and he is hereby, adjudged forever debarred from asserting any claim whatever in or to said real estate adverse to the title of said defendant, Thomas W. Pemberton, and that the said Thomas W. Pemberton do have and recover of the plaintiff, George H. N. Luhrs, his costs and disbursements incurred herein, taxed and allowed at the sum of ten & $\frac{55}{100}$ dollars, and that the said defendants, William A. Hancock and Lilly B. Hancock, do have and recover of the plaintiff, George H. N. Luhrs, their costs and disbursements incurred herein, taxed and allowed at the sum of — dollars.

Done in open court this 1st day of Oct., 1898, at 2 p. m.

By the court:

RICHARD E. SLOAN, *Judge.*

24 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEORGE H. N. LUHRS, Plaintiff, *vs.* WM. A. HANCOCK, LILLY B. HANCOCK, and T. W. Pemberton, Defendants.	Motion for New Trial. Service of Within Motion Admitted Oct. 1, 1898. C. F. Ainsworth, Att'y for Def't Thos. W. Pemberton. Filed October 1st, 1898. Edwin S. Gill, Clerk, by C. H. Knapp, Deputy Clerk.

Comes now the plaintiff, George H. N. Luhrs, and moves the court that the judgment of the court herein be set aside and a new trial granted upon the following grounds, to wit:

1st. The court erred in admitting incompetent evidence on the part of the defendants over the objection of the plaintiff and in rejecting competent evidence offered by the plaintiff.

2nd. That the evidence in this cause does not sustain the judgment herein.

3rd. That the said judgment is contrary to law.

Dated at Phœnix, October 1st, 1898.

HAMILTON & ARMSTRONG,
Attorneys for Plaintiff, George H. N. Luhrs.

25 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEORGE H. N. LUHRS, Plaintiff, *vs.* WM. A. HANCOCK & THOS. W. Pemberton *et al.*, Defendants.	Memorandum of Costs and Disbursements of Def't Thos. W. Pemberton. Filed October 1st, 1898. Edwin S. Gill, Clerk, by C. H. Knapp, Dep'y.

Disbursements.

Clerk's fees	$5.80
Reporter's fees	5.00
	$10.80

TERRITORY OF ARIZONA, *County of Maricopa,* } ss:

C. F. Ainsworth, being duly sworn, deposes and says that he is the attorney for the def't Thos. W. Pemberton in the above-entitled action and as such is better informed relative to the above costs and disbursements than the said def't, Thos. W. Pemberton; that the items in the above memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

C. F. AINSWORTH.

Subscribed and sworn to before me this 1st day of October, 1898.
EDWIN S. GILL, *Clerk*,
By C. H. KNAPP, *Deputy*.

26 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEORGE H. N. LUHRS, Plaintiff,
against
WM. A. HANCOCK, T. W. PEMBERTON, *et al.*, Defendants.
} Judgment-roll. Filed October 1st, 1898. Edwin S. Gill, Clerk.

I, the undersigned clerk of the district court of the third judicial district of Arizona Territory in and for Maricopa county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book F of said court, at page 372; and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and seal of the district court this 1st day of October, A. D. 1898.

[COURT SEAL.] EDWIN S. GILL, *Clerk*.

27 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEORGE H. N. LUHRS, Plaintiff,
vs.
WILLIAM A. HANCOCK and LILLY B. Hancock, Thomas W. Pemberton, Defendants.
} # 2531. Minute Entries.

Be it remembered that on Monday, July 26th, 1897, that being a regular judicial day of the May term, A. D. 1897, of the said court in and for the said county and Territory then holden, the parties to the above-entitled cause being present, the following record of this case for this day was made, to wit:

Title of Cause.

Ordered that this cause be set for trial Wednesday, October 13th, 1897, at 9.30 o'clock a. m.

On Saturday, December 18th, 1897, that being a regular judicial day of the November term, A. D. 1897, the following record of this case for this day was made, to wit:

Title of Cause.

Hon. Webster Street, judge of this court, being disqualified to try this cause, it is ordered that this cause be transferred to Judge R. E. Sloan for trial in this county.

28 On Monday, January 3rd, 1898, that being a regular judicial day of the November term, A. D. 1897, the following record of this case for this day was made, to wit:

Title of Cause.

Ordered that this cause be set for trial Monday, January 5th, at 9:30 a. m.

On Tuesday, January 4th, 1898, that being a regular judicial day of the November term, A. D. 1897, the following record of this case for this day was made, to wit:

Title of Cause.

On motion of Thomas Armstrong, Jr., of counsel for plaintiff, ordered that Thomas W. Pemberton be made a party defendant in this action; that the summons issued herein be amended accordingly, and that plaintiff have leave to so amend his complaint as he may be advised, and the amended summons and complaint be served upon said Thomas W. Pemberton.

On Wednesday, January 5th, 1898, that being a regular judicial day of the November term, A. D. 1897, the following record of this case for this day was made, to wit:

Title of Cause.

By agreement, ordered that the trial of this cause be continued, to be hereafter set.

On Saturday, March 19th, 1898, that being a regular judicial day of the November term, A. D. 1897, the following record of this case for this day was made, to wit:

29 Title of Cause.

Hon. Webster Street, judge of this court, being disqualified to try this cause, it is ordered that this cause be assigned to Judge Richard E. Sloan for trial in this county.

On Friday, April 8th, 1898, that being a regular judicial day of the November term, A. D. 1898, the following record of this case for this day was made, to wit:

Title of Cause.

This cause came on for trial by this court, Messrs. Hamilton and Armstrong appearing for the plaintiff, Joseph Campbell, Esq., appearing for defendants William A. and Lilly B. Hancock, and C. F. Ainsworth appearing for defendant Thomas W. Pemberton. The pleadings were read to the court by counsel. On motion, plaintiff was granted leave to reply to amended answer of defendant Pemberton filed this day. Defendant Pemberton, by his attorney, moved to strike out that part of plaintiff's reply relating to the sanity of defendant Lilly B. Hancock; which motion was granted by the court and excepted to by plaintiff. Plaintiff offered in evidence judgment-roll in case No. 533, records of this court, entitled "Hancock & Company *vs.* William A. Hancock *et al*;" execution issued on judgment in said cause on April 5th, 1892, and return of

sheriff thereon; sheriff's certificate of sale of date July 2nd, 1892, and deed from sheriff to Luhrs of date Feb. 4th, 1893. George H. N. Luhrs and William Christy, witnesses for plaintiff, were sworn and examined, and plaintiff rests.

Defendant Pemberton, by his counsel, moved to dismiss as to him; which motion was denied by the court. George H. N. Luhrs
30 was called and examined as a witness for defendants, and deed from Murphy, sheriff, to G. H. N. Luhrs admitted under objection of plaintiff. Defendant Wm. A. Hancock was sworn and examined and deed from W. A. Hancock to Lilly B. Hancock offered in evidence and other documentary evidence offered by defendant Hancock. Defendant Pemberton offered in evidence note and mortgage from W. A. Hancock and wife to Robert Allstatter, of date March 22, 1892; judgment-roll in case No. 1927, records of this court, entitled "Robert Allstalter *vs.* William A. Hancock *et al.*;" order of sale and sheriff's return, same case, certificate and sheriff's deed. T. W. Pemberton was sworn and examined, and defendant rests. The evidence being closed, cause was continued for argument until tomorrow at 9.30 o'clock a. m.

On Saturday, April 9th, 1898, that being a regular judicial day of the November term, A. D. 1897, the following record of this case for this day was made, to wit:

Title of Cause.

Attorneys for respective parties present. By agreement ordered that this cause be submitted on briefs, plaintiff to file brief in ten days and defendants to have ten days thereafter to reply.

On Saturday, October 1st, 1898, that being a regular judicial day of the May term, A. D. 1898, the following record of this case for this day was made, to wit:

31 Title of Cause.

This cause having heretofore been tried and submitted and the court having duly considered the same and being sufficiently advised in the premises, now, at this day, it is ordered by the court that judgment be entered herein for defendants; whereupon plaintiff presented his motion for a new trial, which was submitted without argument and overruled by the court; to which ruling of the court plaintiff, by his counsel, duly excepted and gave notice in open court of an appeal to the supreme court of the Territory of Arizona from the judgment and from the order denying plaintiff's motion for a new trial. On motion, plaintiff was granted sixty days from this date to perfect appeal.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEORGE H. N. LUHRS, Plaintiff,
vs.
ILLIAM A. HANCOCK and LILLIE B. HANcock and T. W. Pemberton, Defendants.

No. 2531. Reporter's Transcript.

ied to the court on Friday, p. m., April 8th, 1898, before the Hon. R. E. Sloan, judge, sitting without the intervention of a jury, at the court-house, Phœnix, Arizona.

Appearances: Messrs. Hamilton & Armstrong, attorneys for plain-f; Joseph Campbell, Esqr., and C. F. Ainsworth, Esqr., attorney- defendants.

Ejectment.

n action by plaintiff against the defendants to recover possession of certain property in the city of Phœnix, Arizona Territory, sold under foreclosure proceedings by the sheriff upon execution and order of sale, Thomas W. Pemberton intervening and answering as defendant.

roceedings reported by Chas. H. Holmes, court reporter, third jud. dist. Territory of Arizona.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEO. H. N. LUHRS, Plaintiff,
vs.
WILLIAM A. HANCOCK ET AL., Defendant-.

No. 2531.

Be it remembered that on Friday afternoon, the eighth day of pril, A. D. 1898, that being a regular judicial day of the Novem-r term, A. D. 1897, of the said court in and for said county and erritory aforesaid then holden, the within-entitled cause coming on gularly for trial to be heard on the pleadings and proof, the par-s to this cause being present in open court and represented by eir respective counsel, Messrs. Hamilton & Armstrong, attorneys r plaintiff, and Judge Joseph Campbell for the defendants Han-ck and Hancock, and C. F. Ainsworth, Esqr., appearing for the efendant Pemberton, to maintain by them the issues joined in said eadings, the said cause proceeded on trial, and the respective par-s offered in evidence the testimony and documentary evidence as ereinafter fully set out in this transcript of proceedings, the same eing reduced from the court reporter's shorthand notes taken upon he trial of said cause.

That upon the introduction of said testimony and documentary vidence the following objections were then and there interposed by ounsel for the respective parties, rulings by the court made, and xceptions to said rulings taken and noted at the times and in the anner as hereinafter fully set forth in this transcript of evidence, hich is as follows, to wit:

By the COURT, the Hon. R. E. Sloan sitting as special judge: Are you ready in this cause of Luhrs *v.* Hancock?

By Mr. ARMSTRONG: We are ready, your honor, on behalf of plaintiff. I will read the complaint. (Reads the amended complaint.) Mr. C. F. Ainsworth, counsel, reads answer of defendant Pemberton. Judge Campbell read answer of defendants Hancock and Hancock. Counsel for plaintiff asks leave of the court to file answer to the additional plea, which was granted by the court.

By Mr. AINSWORTH: We would like to know what they are, so that we can meet them. I might want to demur to them if it is set up against us.

The COURT, remarking: I presume you will not set up any matter that cannot be met upon trial?

By Mr. ARMSTRONG: Our answer will be to the cross-complaint that we became entitled to the possession on the 4th of February, 1893, after the deed of the sheriff upon the action of Luhrs against Hancock, and that the alleged deed from Hancock to his wife made in 1886 was in fraud of his creditors and in fraud of this particular creditor, whose debt at that time was in existence and unpaid and never has been paid, and that the property at that time was not a homestead, and that we are not parties to the suit of Allstadter and are not in anywise bound by that judgment.

Also that the mortgage to Allstadter was given by the defendant Lily B. Hancock while she was insane and was incompetent to make and execute the mortgage, and the mortgage and foreclosure proceedings under it are void.

By Mr. AINSWORTH: We then make the motion to the court to strike out the answer which raises the question as to the insanity of Lily B. Hancock, and they cannot take advantage of it,
35 it being a collateral attack upon an instrument that they have no interest in.

By Mr. ARMSTRONG: And the further evidence will be set out in the answer that, whatever may be the status of the property prior to 1887, there has been no declaration of homestead by Lily B. Hancock or by him, and when the sale took place to Mr. Luhrs there was no homestead in existence; that is the substance of the answer.

The COURT: It may be considered as having been presented, and I will take it under consideration, but I have clear and distinct views upon this subject.

By Mr. ARMSTRONG: I presume the common source of title down to February 27th, 1886, was in William A. Hancock, one of the defendants in this suit, and that will be admitted.

By Mr. AINSWORTH: Yes, sir.

Plaintiff offers in evidence the judgment of this court in case No. 533, being the case of Newell Herrick and George H. N. Luhrs, partners, doing business under the firm name of Herrick & Co., against William A. Hancock, Lilly B. Hancock, his wife, and Charles A. Tweed, assignee of Hancock, which judgment was rendered on the 7th day of March, 1892.

By Mr. AINSWORTH: I think the judgment-roll should be put in or we will object to it.

The COURT: Yes; I think the judgment-roll should go in.

By Mr. ARMSTRONG: The judgment in that case merits verity and shows their appearance in the case.

The COURT: There might be something in the roll itself that would show. I think I will sustain the objection to it unless the whole judgment-roll is offered in evidence.

36 Plaintiff makes the offer of the judgment in the case just cited. Defendants object to the introduction of the same as incompetent without showing the whole judgment-roll, the pleadings, complaint, summons, and answer.

Objection sustained, and plaintiff excepts to the ruling of the court.

By Mr. ARMSTRONG: In view of this ruling of the court, plaintiff will offer the entire judgment-roll, constituting the complaint, answer, and other pleadings and judgment in that same case, No. 533. There being no objection, the same was thereupon duly admitted and marked by the clerk as Exhibit A.

Plaintiff next offered in evidence the execution issued upon that judgment, issued out of the office of the clerk of the court on the 5th day of April, 1892, together with the sheriff's return thereon, dated July 2nd, 1892.

By Mr. AINSWORTH: Defendants object to the same as to the defendant Pemberton.

By Judge CAMPBELL: We object to the introduction of the same on the part of the defendant Lilly B. Hancock for the reason that the execution wasn't against her.

The objection was overruled, and defendants excepted to the ruling of the court. Same duly identified as Plaintiff's Exhibits B and C.

Plaintiff next offers the sheriff's certificate of sale on this execution made by John B. Montgomery, sheriff, to Luhrs, dated July 2nd, 1892.

Counsel made the same objection as above on behalf of Pemberton and Lily B. Hancock; which objection was overruled and exception taken to said ruling.

37 Same was thereupon admitted and identified as Pl'ff's Ex. D.

Plaintiff next offered in evidence the deed issued upon the certificate of sale last offered, made by John B. Montgomery, sheriff of Maricopa county, to George H. N. Luhrs, dated on the 4th day of February, 1893.

Defendants object to the offer for the reason that the man Montgomery was not in the office when he executed the deed. Taken subject to obj., and defendants except. Same identified as Plaintiff's Exhibit E.

By Mr. ARMSTRONG: Will you admit that he was the same sheriff that made the sale? We claim that the sheriff, John B. Montgomery, who made the sale was the only person who could make the deed.

Defendants don't admit it.

Plaintiff offers to prove that John B. Montgomery, who made the

sheriff's certificate of sale, is the same person who made the sheriff's deed in this case unless it is admitted.

The COURT: You may put in your proof.

Mr. GEORGE H. N. LUHRS, called as a witness to support the issues on behalf of the plaintiff herein, being first duly sworn according to law, was examined, and testified as follows, to wit:

By Mr. ARMSTRONG:

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Are you acquainted with John B. Montgomery?

A. Yes, sir.

Q. You are the person to whom the sheriff's certificate of sale runs, aren't you?

A. Yes, sir.

38 Q. State whether or not that John B. Montgomery is the same person who executed the deed on February 4th, 1893, just offered in evidence.

A. Yes, sir.

By Mr. AINSWORTH: If this is going to the proof of that, we want a chance to cross-examine the witness.

The COURT: Very well.

Witness continuing: It is the same person, John B. Montgomery.

By Mr. AINSWORTH: If they have offered the deed in evidence, we want to cross-examine him.

The COURT: The only purpose for which the witness has now taken the stand is to show that that John B. Montgomery who made the sale is the same person who made the deed.

By Mr. AINSWORTH: Then we ask that the deed which they have offered in evidence out of turn and before identifying the officer, that we have our objection to that.

The COURT: I think it is a matter of defense.

By Mr. AINSWORTH: We want the record to show that we object to the deed on the ground that it is not shown that he is the same party that executed the certificate, and that it has gone in irregularly.

The COURT: If it is supplemented by proof, it is competent. Objection will be overruled and defendants except to the ruling of the court.

Witness excused.

39 GEORGE H. N. LUHRS, Esqr., being recalled by plaintiff for further direct examination, testified as follows, to wit:

By Mr. ARMSTRONG:

Q. Are you acquainted with the property mentioned in this case and in question here?

A. I am.

Q. The same as described in the deed just offered in evidence?

A. It is the same property.

Q. Did you know the property at the time you took that deed?
A. Yes, sir.
Q. You may state, Mr. Luhrs, who was occupying that property at that time.
A. William A. Hancock.
Q. Who has continued to occupy it ever since that time?
A. Mr. William A. Hancock occupied it, and has continued to until Mr. Pemberton took it.
Q. Who is in the occupancy of it now?
A. Mr. Pemberton.
Q. Do you remember just how long Mr. Hancock continued to occupy it after you took that deed?
A. Until the beginning of March, 1896.
Q. Do you know what property similar to that rents for here in this city?
A. No; I don't.
Q. Do you know the rental value of that property?
A. Do you mean at that time?

The defendants object to this testimony for the reason that the witness has not shown himself competent to answer.

40 Cross-examination.

By Judge CAMPBELL:

Q. Did Lily B. Hancock occupy that property also?
A. Yes; they were living there as man and wife.
Q. Mr. Hancock and family lived there, didn't they?
A. Yes, sir.
Q. It was the place of residence of the family, wasn't it?
A. I believe it was.
Q. And during all of the time you knew it?
A. Yes, sir.
Q. For how many years?
A. Ever since I have been here they have lived there, up to 1896 from 1878. That is all I know.
That is all.

WILLIAM CHRISTY, Esqr., being duly sworn, was examined, and testified as follows, to wit:

By Mr. ARMSTRONG:

Q. You are living here and have lived here since 1883?
A. Yes, sir.
Q. Are you acquainted with the values of property in the neighborhood of the Hancock property, so called, in block 77?
A. Yes.
Q. You know the Hancock property now occupied by Mr. Pemberton, do you not?
A. Yes, sir.
Q. Being lots 14, 16, 17, and 18, in block 77, of this city?
A. Yes, sir.

Q. Did you know that property in 1892?

41 A. Yes; I did.

Q. And you have known it from that time to this?

A. Yes.

Q. Do you know about what similar property is worth or was worth in 1892 or 1893, in February?

By Mr. AINSWORTH: We object to that testimony as to the value of the property.

By Mr. ARMSTRONG:

Q. I mean the rental value of the property from February, 1893, to the present time.

A. No; I don't believe I could tell that. I don't know just what improvements were on the property.

Q. Suppose the property was vacant—without any improvements upon it—what would it be worth?

A. The rental value of it?

Q. Yes.

A. I wouldn't consider it to be worth anything.

Q. You say it wasn't worth anything?

A. I wouldn't consider it worth very much. It might have a little value, but ground rent on unimproved property like that wouldn't be worth much.

Q. State what it would be worth.

A. I don't believe I could.

Q. Suppose there was a dwelling-house upon a part of the property—an adobe dwelling-house of four or five rooms—then what would be the rental value of the property?

A. From my recollection of the house that is on it, it was worth about $15.00 per month.

Q. You know that property and the house?

A. Yes.

42 Q. Was that house on that property from February, 1893, to 1896?

A. It was on there part of the time. I don't recollect when it was burned down.

Q. The house burned recently, didn't it?

A. It burned when I was away from the city. I cannot tell when it was that the house burned.

Q. What was the rental value of that place from the third day of February, 1893, to the 4th day of March, 1896?

A. I would say $15.00 per month.

Q. And from the 4th of March, 1896, up to the present time how much would be the rental value of it?

A. I couldn't tell you that.

Q. It had some rental value, hadn't it?

A. I would hate to have paid the taxes on it for the ground rent. That is all.

Witness excused.

Plaintiffs rest-.

Defendants move the court for a dismissal of this case as to the defendant Pemberton for the reason that they have not shown any interest in Hancock either at the time of this levy or execution or sale or at the time of the rendition of the judgment.

Motion was denied by the court, and defendant Pemberton excepted to the ruling of the court.

Defense.

By Mr. AINSWORTH: We will call Mr. Luhrs again on behalf of the defendants.

G. H. N. LUHRS, Esqr., called as a witness on behalf of
43 defendants, having been duly sworn, was examined, and testified as follows, to wit:

Examination by C. F. AINSWORTH, Esqr.:

Q. (Handing written instrument to witness.) Will you please look at that instrument?

A. Yes, sir.

Q. Whose signature is attached to that?

A. Yes; I recognize it.

Q. Did you take this instrument from the sheriff?

Plaintiff objects to the question as incompetent, immaterial, and irrelevant and not tending to prove any of the issues of this case.

Q. I suppose there is no objection to its execution?

By Mr. ARMSTRONG: No, sir.

By Mr. AINSWORTH: We contend that they having taken a deed and placed it on record is notice to the world that they claim under that deed.

The COURT: If your contention is correct that the statute begins to run from the time when the purchaser is entitled to a deed, the question of the execution of the deed is immaterial.

By Mr. AINSWORTH: I will show that they have exercised the right and taken the deed and placed it of record, and that is notice to everybody that they claim under that deed.

The COURT: That don't make any difference so far as the plaintiff is concerned. The question is, When did he have the right to bring the action? Is he entitled to sue in ejectment before he obtained a deed?

By Mr. AINSWORTH: We say he has. That is one of the contentions.

44 The COURT: I thought you stated that he had a right to bring the action at any time that he was entitled to a deed?

By Mr. AINSWORTH: But a man cannot go down and take a sheriff's deed to property and let it go along, and then take another one and thereby extend the statute of limitations.

The COURT: I think so. If this deed is valid, then I think it is important in determining when the statute of limitations began to

run, and for that reason only. If this deed is peremptorily executed, and then the subsequent deed was executed, the question is whether the objection would lie upon this deed.

By Mr. AINSWORTH: Yes; I say it is a valid deed in itself and an action for ejectment lies upon this deed.

By Mr. HAMILTON: We are not claiming under this deed. They have forced the chain of title upon us, but we don't claim under it. We don't have any right to bring the suit under this invalid deed.

The COURT: Under their plea of the statute of limitations, the very moment your right of action accrued, then the statute of limitation began to run.

By Mr. HAMILTON: That is with reference to the right of action, which we show in this case. We have made a *prima facie* case. It must go to the right of action we have made; not that they may come in with proof on defense and set out something else.

The COURT: If Murphy passed title to these premises, so as to entitle these people to bring the suit in ejectment, then the statute of limitations began from that time, and I think they are right,
45 so it will be admitted in evidence, subject to your objection under your plea of statute of limitation.

Defendant- formally offers the deed in evidence. Plaintiff objects to the admission of the deed, and excepts to the ruling of the court. Same was thereupon duly admitted and marked Defendants' Exhibit No. 1.

By Mr. AINSWORTH, addressing the witness Luhrs:

Q. You filed this for record, and at the time that it bears date?
A. Yes, sir.
Q. Yourself?
A. Yes, sir.

The COURT: Have the defendants been in adverse possession for more than three years? The point in issue between you is as to when the statute began to run. The matter of adverse possession was lost sight of until the court suggested it. Some proof as to the character of possession is essential under our statute. Mere possession is not sufficient—it must be adverse possession; but you may put in your proof and I will hear you later on.

By Mr. AINSWORTH: That is all.

Witness excused.

WILLIAM A. HANCOCK, Esq., called as a witness on behalf of the defendants and first being duly sworn, was examined and testified as follows, to wit:

By Mr. AINSWORTH:

Q. Where do you reside?
A. I am living in Phœnix.
46 Q. How long have you lived here?
A. Since 1870.
Q. Do you know and are you familiar with lots numbered 14 to

18, in block 77, the property described in the complaint in this action?

A. Yes, sir.

Q. How long have you been in possession of that property?

A. I was in possession of it from some time in December, 1872, until recently—until Mr. Pemberton took possession of it; that was on the 5th of March, 1896.

Q. Is that the date the house burned?

A. Yes. The house burned on the night of the 4th, and the sheriff put him in possession of it the next morning. I was living there from the time I had my house completed—since the 5th of February, 1873, to the 5th of March, 1896.

Q. What was that character of your possession of that property as against Mr. Luhrs?

A. It was adverse to the whole world; the plaintiff and everybody else. We have occupied it as a homestead from the time we were married.

Q. When was that?

A. On the 5th of February, 1873.

Q. Mr. Hancock, I will ask you to look at this instrument. Is that your signature?

A. Yes, sir.

Q. And it was executed at that time it bears date?

A. Yes, sir; on the 27th of February, 1886.

Defendants offer this deed in evidence from William A.
47 Hancock to Lily B. Hancock, dated on the 27th of February, 1886, for this same property.

Plaintiff objects to the introduction of the deed upon this ground: that *is it* a deed purporting to be given by William A. Hancock to his wife for the consideration of love and affection for the premises in dispute, and it is shown by the proof already in evidence in this case that the debt which was finally merged into the Luhrs judgment and upon which he obtained this deed was in existence at the time of this deed, and therefore this defendant, William A. Hancock, was without the power to make his conveyance to his wife; that it was in fraud of his creditors, and her love is not effected by it.

The COURT: I will rule upon that objection as to the admission of the deed in evidence.

Plaintiff excepts to the ruling of the court. Same identified as Defendants' Exhibit No. 2.

Q. At the time you made this deed in 1886 were you then living on this property as your homestead?

A. Yes, sir; with my family.

Plaintiff objects to that as a conclusion of law.

Objection sustained.

Q. Were you claiming it as a homestead?

A. Yes, sir.

The COURT, remarking: A homestead is different from a homestead exemption.

Plaintiff makes the further objection to the introduction of the deed, that it is not sufficient as a deed for homestead. It was a free gift from him regardless of the homestead under that act.
48 If he makes a deed to her because it is a homestead, then it is a deed which divests him of that homestead. He cannot make this deed to her unless the deed to her is made as required for a homestead under the statute you have just read.

Objection overruled. Plaintiff excepted to the ruling.

By Mr. AINSWORTH:

Q. You were living on these lots in 1886, these five lots in question?
A. Yes, sir.
Q. Had you so been living upon them from February, 1873?
A. Yes, sir.
Q. With your family?
A. Yes, sir.
Q. Do you know what was the value of those five lots at that time you made this conveyance to your wife?
A. It was about $3,000 or $3,500—that is, $500 or $600 per lot.
Q. Did you make any claims at that time that it was your homestead?
A. Yes, sir; I claimed it at that time as my homestead.

Plaintiff objects to the question and asks the court to strike out. The court sustained the objection and instructed the reporter to strike said testimony out.

Q. You had a family there?
A. Yes, sir; and I lived there at that time with my family after the deed so made to my wife.
Q. Lived in it as your home?
A. Yes, sir.
Q. Was that your residence there continuously with your
49 family up to the time you were turned out of there by Mr. Pemberton?
A. Yes, sir; my family was there and I was there most of the time. It was my families and my home.
Q. Were those five lots set up by you in your case No. 533 as a homestead?
A. Yes, sir; but one lot wasn't included in this mortgage.
Q. But the answer set up that the five lots was the homestead?
A. Yes, sir.

That is all.

Cross-examination.

By Mr. ARMSTRONG:

Q. At the time you made this deed to your wife, had you any other property in 1886?
A. Yes.

Defendants object to that as immaterial, incompetent, and irrelevant, if this is his homestead, whether they had one cent or not Objection overruled. Defendants excepted to the ruling of the court.

Q. Had you any other property at that time?
A. Yes.
Q. What property was it?
A. It is hard for me to enumerate now.
Q. Did you have any real estate at that time?
A. I had a section of land down in the lower end of the valley and I had a number of lots scattered throughout the city.
Q. You had a section of land down in the lower part of the valley?
A. Yes; section 4, township one north of range one east.
Q. Is that the property that you homesteaded from the Government?

A. No, sir; I entered that under the desert act and acquired
50 the title to it from the Government; and I had 160 acres out north from here at that time.

Q. Did you have title to that from the Government at that time?
A. Yes, sir.
Q. Had you received the patent to it prior to that time?
A. I think so. Proof was made on the section in 1880, and on the quarter section that I pre-empted.
Q. You saw that you received a patent for that prior to 1886?
A. Yes, sir; my impression is that I had it prior to that time.
Q. Was that land incumbered in 1886?
A. I don't know. No; I think it was mortgaged at that time.
Q. What became of that land?
A. My brother-in-law holds it—Mr. Pattrick.
Q. When did you part with it?
A. I couldn't give you the date of that.
Q. Don't you know that it was prior to the time that you made this deed to your wife?
A. No, sir; it was subsequent to that time, I think.
Q. What was the value of that piece of property?
A. Section four?
Q. Yes; in 1886.
A. Ten thousand dollars, I suppose; in that neighborhood.
Q. What was the amount of incumbrance upon it?
A. That I don't remember.
Q. It was incumbered, wasn't it?
A. Yes; there was some three or four thousand dollars against it.
Q. Do you know when you sold it to your brother-in-law?
A. No, sir; I cannot remember now.

Q. What did he pay you for it?
51 A. He took up the claims against it.

Q. And that is all of the consideration that he paid you for it?
A. Yes. To explain that, I will say that he took it up with the

hope that I might be able to realize something out of it subsequently, which I have not yet been able to do.

Q. And you don't know the date of that?

A. No, sir.

Q. What other pieces of property was there?

A. I had 160 acres out here in the northeast quarter of section 32.

Q. In what town and range?

A. Township two north of range two east.

Q. How long have you had that property?

A. Well, it is a good long time ago. I don't remember just when I got the title to it. That was transferred to Mr. Patrick at the same time the section was.

Q. And for the same purpose?

A. Yes.

Q. Was that property incumbered?

A. Yes; it is in under the same mortgage as the section was.

Q. What other property had you?

A. Well, it is hard for me to remember dates. I cannot remember when I parted title with that property in the city; I don't know whether it was before 1886 or afterwards.

Q. And you cannot say whether you had any other property in the city or any other property other than that you have now mentioned.

A. I didn't own anything in the city at that time excepting what was under mortgage.

52 Q. Everything was incumbered at that time?

A. Yes, sir.

Q. What has become of that property?

A. It has gone to pay the parties that held the incumbrance on it.

Q. At the time you made this conveyance to your wife will you swear that you held the title to any other real estate in this valley?

A. Well, I made an assignment to Judge Tweed and I cannot tell whether that was before this time or not.

Q. Don't you know that this very case—the case of Herrick & Luhrs—was brought against you, and that Mr. Tweed at the time of their bringing this suit was your assignee for the benefit of your creditors?

A. Yes; that is a fact. He died in 1888. I remember the assignment was made to Judge Tweed before the deed to my wife.

Q. Then you didn't own a particle of property at the time of the commencement of this suit?

A. No, sir; it had been assigned for the purpose of paying my debts.

Q. And this suit was commenced against you when—do you remember?

A. No, sir; I don't remember. It was some time in 1885.

Q. And prior to the making of that deed to your wife?

A. Yes.

Q. Then at the time of your making this deed to your wife in

1886 you didn't have any real or personal property except the property that you conveyed to your wife?

A. No, sir; none excepting what was exempt from execution.

53 Q. Everything of yours was in the hands of the assignee?

A. Yes.

Q. You say you were living on this property over east and made your home there?

A. Yes.

Q. And you continued to make your home there until you turned it over to Mr. Pemberton in 1886?

A. Yes; that was the home of my family.

Q. Didn't you make your home there with your family?

A. I suppose I called it my home, yet I was not living there all of the time. I called it the homestead of my family, and I lived on the other side of the river a part of the time.

Q. When did you commence to live on the other side of the river?

A. Some time in 1889 or '90. I am not certain about that.

Q. Did you make application for homestead from the Government of the United States for land on the other side of the river?

Defendant objects to the question as incompetent. Objection sustained.

Plaintiffs offer to show by this witness that on the 19th day of June, 1888, witness made his application for homestead to the Government of the United States for the northwest quarter of section 2, in town 1 north of range 3 east, and filed his application in the United States land office at Tucson at that time; that he afterwards completed his homestead proofs under that application and received from the Government of the United States a certificate of the receiver of the land office for that piece of land as his homestead, and we offer in evidence a certified copy of his application to the Government for that homestead, his affidavits in support of

54 same, and all the proofs made by him on the application of homestead.

By Mr. AINSWORTH: Defendants object to the offer to prove as incompetent, immaterial, and irrelevant. Objection sustained by the court, and plaintiffs except.

By Mr. ARMSTRONG: Where did your family reside during the time you were residing on this piece of land across the river?

A. My wife was a part of the time here on the homestead and a part of the time in California. One of the children was there in California, although only for a while, and then went back here, and one remained there until she came back here.

Q. The house, all of the time, was occupied by some member of your family?

A. I had a room in it that I occupied some times and a part of the time it was rented.

Q. How much of the time did your wife live here at this house after you went across the river to live, as you say?

A. It is pretty hard for me to say now.

Q. Isn't it a fact that she kept the house open and cared for the children that they might go to school here in the city?

By the COURT: What is the purpose of this?

By Mr. ARMSTRONG: It is for the purpose of showing that while he was living there she was claiming a home here and living in California.

Defendant- objects to the question as immaterial.

Q. Did you make a declaration of homestead?

Defendants object to the question as immaterial and irrelevant.

The COURT: I don't see that it makes any difference whether they lived there or not, as long as they made a declaration of home-
55 stead. It was no homestead after 1887.

By Mr. ARMSTRONG: This offer is to show that it was his intention to make another declaration and to go over there and to claim a homestead for himself.

The COURT: The question of homestead is eliminated from this, unless in 1886 there was a homestead, so as to determine the validity of this deed. Your points and view of the matter differ. The defendants take the view that because it was a homestead the question of the indebtedness of Mr. Hancock at that time cuts no figure, because the property was exempt from execution and he could part with it as he saw fit to his wife, and your contention is that it does make a difference. The fact that he was in debt himself makes this deed to his wife a fraud, notwithstanding it was a homestead.

By Mr. ARMSTRONG: That is it.

By Mr. AINSWORTH: That is it exactly.

By Mr. ARMSTRONG:

Q. Did either you or your wife ever make or file any declaration of homestead after July 1st, 1887?

Defendants object to the question as immaterial, incompetent, and irrelevant. Objection overruled, and defendants except to the ruling of the court.

A. No; we never filed any declaration of homestead, neither myself nor my wife.

By Mr. ARMSTRONG: I think we will ask a certain line of questions which, under our view of the case——

The COURT (interrupting): That is a matter of defense.

By Mr. ARMSTRONG: When was your wife first adjudged insane?

Defendants object to the question as immaterial, incompe-
56 tent, and irrelevant, and it cannot be raised in this issue.

No ruling.

Q. Your wife, Lily B. Hancock, has been insane, has she not?

Objected to as against the defendant Pemberton, it being irrelevant.

Objection sustained.

It was thereupon stipulated between counsel that the following
idence might be offered with the same effect as though the pro-
te judge of this county were actually upon the stand with his rec-
ds.

Plaintiff offers to show by the probate judge of this county that on
e 23rd day of March, 1886, Lily B. Hancock, the defendant in this
se, was adjudged to be insane by a decree of the probate court of
is county, and plaintiff offers in evidence page 99 of the said In-
ne Record.

Defendants object to that on the ground that it is immaterial, in-
mpetent, and irrelevant, and it cannot be put into this suit as his
llateral attack upon defendants' title.

Objection sustained. Plaintiff excepts to the ruling of the court.

By Mr. ARMSTRONG: How long prior to March 23rd, 1886, had
ur wife been insane?

Defendants make the same objection as before. Same ruling by
e court and exception by plaintiff.

Q. State whether on the 21st of March, 1892, your wife was in-
ne.

Defendants make the same objection. Same ruling by the court
d exception.

By Mr. AINSWORTH: I would like the record to show that we ob-
ject to this as not proper cross-examination.

The COURT remarking: You may make him your own wit-
ness for this purpose if you wish.

It was thereupon stipulated that the witness now upon the stand
tifying with regard to the insanity of his wife is made plaintiff's
tness.

By Mr. ARMSTRONG:

Q. State whether or not your wife, Lily B. Hancock, was insane
l continued to be insane from the 21st day of March, 1892, down
and including the year 1895.

Defendants object to the question for the same reasons as stated
ore. Objection sustained. Plaintiff excepts.

That is all.

Witness excused.

Redirect examination.

By Mr. AINSWORTH:

Q. One moment. I have discovered in this record of the case No.
3 two judgments, one for the foreclosure of the mortgage upon
s property. How was that mortgage liquidated or paid?

Plaintiff objects to the question as immaterial, incompetent, and
elevant.

The COURT remarking: What difference does it make? I will
tain the objection.

Defendants offer to show by this witness that the title through which we now claim was deraigned by the mortgage of William A. Hancock & Lily B. Hancock to Allstadter for the purpose of paying off the mortgage on the property at the time he made the conveyance to his wife.

Plaintiff objects to the offer as irrelevant. Objection sus-
58 tained, and defendant- excepts.

Defendants offer in evidence a mortgage and note, together with the recording of the same, executed by William A. Hancock and Lily B. Hancock, his wife, dated on the 22nd of March, 1892.

Plaintiff objects to the introduction of the same mortgage in evidence for the reason that the defendant Lily B. Hancock was at that time insane and incompetent to execute it.

Objection overruled, and plaintiff excepted to the ruling of the court. Same duly identified as Defendants' Exhibits No. 3 and 32.

Defendants offer the entire judgment-rill in the case of Allstadter against Hancock *et als.*, No. 1927, including the complaint, the answer, the amended complaint and answer, the summons, and decree of the court.

Same, being duly admitted without objection, was thereupon marked Defendants' Exhibit No. 4.

Defendants then offered the execution and order of sale, with the the sheriff's return thereon.

Same, being duly admitted without objection, was marked as Defendants' Exhibit No. 5, together with the sheriff's certificate of sale and foreclosure No. 5½.

Now, there was one deed put in here amongst these papers, but it is lost; it is the sheriff's deed, and it is of date * * *

By Mr. ARMSTRONG: It may be stipulated.

By Mr. AINSWORTH, continuing: Of date February 14th, 1895, from Orme, the sheriff of Maricopa county, to Thomas W. Pemberton; sheriff's deed for the lots; consideration, $3,511.80; to lots 14 to 18, both inclusive, in block 77, in the city of Phœnix, under the plat thereof. * * * The deed recites the judgment and
59 decree entered of date May 10th, 1894, in the action wherein Robert Allstadter was plaintiff and William A. Hancock and others defendants, with the usual recitals of proof of title in Mr. Pemberton.

Same duly admitted without objection and identified as Defendants' Exhibit No. 6.

That is all.

Witness Hancock excused.

T. W. PEMBERTON, Esqr., called as a witness in support of the issues of defendants herein, being first duly sworn according to law and examined upon his oath, testified as follows, to wit:

Examination by Mr. AINSWORTH:

Q. Where do you reside?

A. Near Phœnix, about two and one-half miles out in the country.

Q. Do you know this property in question, lots numbered 14 to 18, in block No. 77, in the city of Phœnix?
A. Yes, sir; I do.
Q. Who occupies it?
A. I do.
Q. How long have you occupied it?
A. About two and a half years. Ever since I got possession of it.
Q. You took possession of it under your deed?
A. Yes, sir; after the deed was made the sheriff gave me possession.
Q. What was the nature of that possession as against anybody else or as against the plaintiff, Mr. Luhrs?
A. I have been holding possession of that property as against everybody.
60 Q. And no action was brought against you until this action was brought?
A. No, sir.
Q. Is the amount stipulated in the sheriff's deed that you paid for the property?
A. Yes, sir.

Plaintiff objects to that as immaterial. Objection overruled.

Q. Prior to the time these papers were served on you and after you went into possession of that property, did you improve the property in any way?

Plaintiff objects to the question as immaterial. Objection overruled, and exception noted.

A. I put a row of buildings on the first-avenue side of it.
Q. What is the estimate of cost of those improvements?
A. It is between $6,000 and $7,000.
Q. What was the value of those other improvements excepting the buildings?
A. What do you mean?
Q. Money expended for sidewalks and grading, etc.
A. That includes my expenditures of cash for the improvements, between $6,000 and $7,000.
Q. Have you paid the taxes on it ever since you have had possession of the deed for it?
A. Yes; a portion of the time.
Q. Do you know how much in taxes you have paid?
A. The taxes for city and county are about $325.00 per year, and I think I have paid it three times. This is the fourth year,
61 I think.

That is all.

Cross-examination.

By Mr. ARMSTRONG:

Q. [illegible]re you the same Thomas W. Pemberton who was made defend[illegible]n the cause of Allstader against Hancock and others?

A. Yes, sir.

That is all.
Plaintiff rests.
Witness excused.
By Mr. AINSWORTH: That is all.
Defendants rest.
Case closed.
By the COURT: Very well, if that concludes the evidence I will have to hear the arguments on tomorrow.
Court thereupon adjourned.

62 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEORGE H. N. LUHRS, Plaintiff,
vs.
WILLIAM A. HANCOCK and LILY B. HANCOCK and T. W. Pemberton, Defendants. } No. 2531.

TERRITORY OF ARIZONA, }
County of Maricopa, } *ss:*

I, Chas. H. Holmes, official court reporter of the third judicial district of the Territory of Arizona, do hereby certify that I was in attendance at the trial of the above-entitled cause in the district court of the county of Maricopa, Territory of Arizona, on the 8th day of April, A. D. 1898; that I was the duly appointed and acting court reporter of said court on said day, and am now; that as such court reporter, by agreement of the parties to this cause and under the direction of the court at the trial, I reported phonographically the proceedings and all of the oral evidence adduced and set out upon the trial of said cause.

That I have this day, the 13th day of December, A. D. 1898, completed the transcript of the said evidence at the request of counsel for plaintiff in said cause and reduced to typewriting all of
63 my said phonographic notes of said evidence and proceedings, including the objections of counsel, the rulings by the court, and the exceptions to said rulings by the respective counsel, in the manner and at the times as therein taken and noted, and I hereby certify the foregoing thirty-one pages of typewritten matter to contain a full, true, correct, and complete statement of all of the said proceedings and all of the oral evidence offered and had in said cause, and that no other evidence was therein offered to be introduced upon the trial of said cause.

In testimony whereof I, Chas. H. Holmes, court reporter, as aforesaid, do hereby set my hand officially on this 13th day of December, A. D. 1898.

CHAS. H. HOLMES,
Court Reporter, Third Judicial District of the Territory of Arizona.

Done at Phœnix, A. T.

64 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GEORGE H. N. LUHRS, Plaintiff, vs. WILLIAM A. HANCOCK and LILLY B. HANCOCK, Thomas W. Pemberton, Defendants.	No. 2531. Clerk's Certificate.

Lloyd Johnston, Esq., clerk of the supreme court of the Territory of Arizona.

SIR: An appeal has been taken by the plaintiff in the above-entitled action from the judgment and decision rendered therein in behalf of defendant, and against plaintiff in this court on the 1st day of October, 1898, which said appeal has been duly perfected. I herewith certify and transmit to you the entire record in said cause, including original papers on file in this court and all minute orders in the case, the decision and judgment rendered therein by this court and entered of record therein, together with testimony taken in the case, as transcribed and certified to by the court reporter and filed as a part of the record in this cause.

Dated this 22nd day of December, 1898.

EDWIN S. GILL,
Clerk of the District Court.

65 PLAINTIFF'S EXHIBIT "A."

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

NEWELL HERRINK and GEORGE H. N. Luhrs, Copartners, Doing Business under the Firm Name and Style of Herrick & Co., Plaintiffs, vs. WILLIAM A. HANCOCK, LILLY B. HANCOCK, Wife of William A. Hancock, and Charles A. Tweed, Assignee of William A. Hancock, Defendants.	Case No. 533. Complaint for Foreclosure of Mortgages. Filed September 21st, 1885. C. H. Knapp, Clerk.

The plaintiffs, complaining of the defendants, allege:

I.

For a first cause of action, 1st, that at all the times hereinafter mentioned Newell Herrick and George H. N. Luhrs, plaintiffs aforesaid, were and they now are copartners, doing business under the firm name and style of Herrick & Company, at Maricopa county, in Arizona Territory, and prior to the commencement of this action the said plaintiffs had complied with all the provisions of an act of the Legislative Assembly of the Territory of Arizona entitled "An act relating to copartnerships, approved March 8th, 1885."

2nd. That on the first day of November, A. D. 1883, at Maricopa county, in Arizona Territory, the said certain defendant, William A.

Hancock, made his promissory note in writing, bearing date on that day, in the words and figures following, to wit:

"$1,008.60. PHŒNIX, A. T., *Nov.* 1*st*, 1883.

On the first day of July, 1884, for value received, I promise to pay to the order of Guss Ellis & Co. ten hundred and eight $\frac{60}{100}$ dollars, with interest, at the rate of one and one-half per cent. per
66 month, from date until paid.

(Signed) WM. A. HANCOCK."

and then and there delivered such said promissory note to the payees mentioned, to wit, Guss Ellis & Co.

3rd. That the said certain defendant, William A. Hancock, to secure the payment of the said principal sum and the interest thereon, as mentioned in said promissory note, according to the true tenor thereof, did execute, under his hand and seal, and deliver to the said Guss Ellis & Co., on the 10th day of November, A. D. 1883, at Maricopa county, in Arizona Territory, a certain mortgage bearing date on the said 10th day of November, A. D. 1883, and conditioned for the payment of said principal sum of one thousand and eight $\frac{60}{100}$ dollars and interest thereon at the rate and at the time and in the manner specified in said promissory note and according to the conditions thereof; which said mortgage was duly acknowledged and certified, so as to entitle it to be recorded, and the same was afterwards, to wit, on the 12th day of November, A. D. 1883, at ten minutes past nine o'clock a. m. of that day, duly recorded in the office of the county recorder of the county of Maricopa, in Arizona Territory, in Liber No. 2 of Mortgages, at pages 620 and 621, a copy of which said mortgage, with the indorsements thereon, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

4th. That the said principal sum mentioned in said promissory note and mortgage, to wit, one thousand and eight $\frac{60}{100}$ dollars, together with interest thereon, at the rate of one and one-half per cent. per month, from the first day of November, 1883, have not been paid by said defendant, William A. Hancock, nor any part thereof, and all of said principal sum mentioned in said promissory note and mortgage, together with the said interest thereon, is now due and unpaid.

67 5th. That on the 28th day of February, A. D. 1885, at Maricopa county, in Arizona Territory, the said Guss Ellis & Co., by an instrument in writing under their hands and seals, assigned said promissory note and mortgage to these plaintiffs, and then and there delivered the said promissory note and mortgage to the plaintiffs, who are now the lawful owners and holders of the same.

6th. That the said certain defendants, Lilly B. Hancock and Charles A. Tweed, have or claim to have some interest or claim upon said premises or some part thereof, which interests or claims are subsequent to and subject to the lien of the plaintiffs' said mortgage.

7th. That the said mortgage contains the covenant of ten per cent. as attorneys' fees on judgment of foreclosure *if* such said mortgage, and the same is reasonable attorneys' fees therefor.

II.

For a second cause of action plaintiffs allege:

1st. That at all the times hereinafter mentioned Newell Herrick and George H. N. Luhrs, plaintiffs aforesaid, were and they now are copartners, doing business under the firm name and style of Herrick & Company, at Maricopa county, in Arizona Territory, and prior to the commencement of this action the said plaintiff- had complied with all the provisions of an act of the Legislative Assembly of the Territory of Arizona entitled "An act relating to copartnerships," approved March 8th, 1885.

2nd. That on the 17th day of December, 1883, at Maricopa county, Arizona Territory, the said certain defendants, William A. Hancock and Lilly B. Hancock, made their promissory note in writing bearing date on that day in the words and figures following, to wit:

$1,602.90. PHŒNIX, A. T., *December* 17*th*, 1883.

On the first day of August, A. D. one thousand eight hun-
68 dred and eighty-four, without grace and for value received, we or either of us promise to pay to the order of Herrick & Company the sum of sixteen hundred and two $\frac{90}{100}$ dollars, with interest thereon, at the rate of one and one-half of one per cent. per month, from date until paid.

WM. A. HANCOCK.
LILLY B. HANCOCK."

and then and there delivered such said promissory note to these plaintiffs.

3rd. That the said certain defendants, William A. Hancock and Lilly B. Hancock, to secure the payment of the said principal sum and the interest thereon mentioned in said promissory note, according to the true tenor thereof, did execute, under their hands and seals, and deliver to these plaintiffs on the 17th day of December, A. D. 1883, at Maricopa county, in Arizona Territory, a certain mortgage bearing date on the 17th day of December, 1883, and conditioned for the payment of said principal sum of sixteen hundred and two $\frac{90}{100}$ dollars and interest thereon at the rate and at the time and in the manner specified in said promissory note and according to the conditions thereof, which said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was afterwards, to wit, on the 17th day of December, A. D. 1883, at two o'clock p. m. of that day, duly recorded in the office of the county recorder of the county of Maricopa, in Arizona Territory, in Liber No. 3 of Mortgages, at pages 3 and 4; a copy of which said mortgage, with the indorsements thereon, is hereto annexed, marked "Exhibit B," and made a part of this complaint.

4th. That the said principal sum mentioned in said promissory note and mortgage, to wit, sixteen hundred and two $\frac{90}{100}$ (1,602.90)
dollars, together with interest thereon, at the rate of one and
69 one-half per cent. per month, from the 17th day of December, A. D. 1883, have not been paid by said defendants, William A. Hancock and Lilly B. Hancock, except the sum of eight hundred

and eighty-two $\frac{46}{100}$ dollars paid thereon on the 30th day of September, A. D. 1884, leaving a balance of nine hundred and forty-two $\frac{83}{100}$ dollars, together with interest thereon from the 30th day of September, 1884, remaining due and unpaid by said defendants on the principal sum and interest mentioned in said promissory note and mortgage.

5th. That the plaintiffs are now the lawful owners and holders of said promissory note and mortgage.

6. That the defendant Charles A. Tweed has or claims to have some interests or claims upon said premises or some part thereof, which interests or claims are subsequent to and subject to the lien of the plaintiffs' mortgage.

7th. That the said mortgage contains the covenant of ten per cent. as attorneys' fees on judgment of foreclosure of such said mortgage, and the same is reasonable attorneys' fees therefor.

8th. And plaintiffs further allege that the last above-mentioned mortgage embraces and covers all of the property mentioned and described in the first and senior mortgage set out and described in this complaint, and in addition thereto embraces and covers other and separate property, to wit, lot No. 14, in block No. 77, in the city of Phœnix, Maricopa county, Arizona Territory, according to the official map or plat of said city.

Wherefore plaintiffs demand judgment as follows:

1st. Against the defendant William A. Hancock for the sum of one thousand and eight $\frac{60}{100}$ (1,008.60) dollars, with interest thereon, at the rate of one and one-half per cent. per month, from the
70 1st day of November, A. D. 1883, and for costs of suit and 10 % thereon as attorneys' fees.

2nd. For judgment against the defendants William A. Hancock and Lilly B. Hancock for the sum of nine hundred and forty-two $\frac{83}{100}$ (942.83) dollars, with interest thereon, at the rate of one and one-half per cent. per month, from the 30th day of September, 1884, and for costs of suit and 10% thereon as attorneys' fees.

3rd. That the usual decree be made for the sale of said premises by the sheriff of said county according to the law and practise of this court in the manner following, to wit: That the property mentioned in the first and senior mortgage in this complaint set out, to wit, lots Nos. fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block No. seventy-seven (77), in said city and county, be first sold and the proceeds of said sale be applied in payment of the amount due plaintiffs on the said first and senior mortgage and promissory note, together with costs and counsel fees, and the overplus, if any there be, may be credited upon the amount due to the plaintiffs upon the second and junior mortgage in this complaint set out, and that said defendants and all persons claiming under them subsequent to the execution of said mortgages upon said premises, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in the said premises and every part thereof, and that the said plaintiffs may have judgment and execution against the said defendant, William A. Hancock, for any deficiency which may remain after applying all

the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment; that the property mentioned and described in the second and junior mortgage in this complaint set out, to wit, lots No. fourteen (14), fifteen (15), sixteen (16), seventeen
71 (17), and eighteen (18), in block No. seventy-seven (77), in said city and county, be sold, and that the proceeds of said sale may be applied in payment of the amount due to the plaintiffs upon the said second and junior mortgage and promissory note, costs, and counsel fees, and that said defendants, William A. Hancock and Lilly B. Hancock, and all persons claiming under them subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in the said premises and every part thereof, and that the said plaintiffs may have judgment and execution against the said defendants, William A. Hancock and Lilly B. Hancock, for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of plaintiffs' judgment.

4th. That the plaintiffs or any other party to the suit may become a purchaser at said sale; that the sheriff execute a deed to the purchaser; that the said purchaser be let into the possession of the premises on production of the sheriff's deed therefor, and that the plaintiffs may have such other or further relief in the premises as to this court may seem meet and equitable.

A. C. BAKER &
H. N. ALEXANDER,
Attorneys for Plaintiffs.

TERRITORY OF ARIZONA, }
County of Maricopa, } *ss:*

George H. N. Luhrs, being *fully* sworn, deposes and says that he is one of the plaintiffs above named and makes this verification on behalf of himself and the said Newell Herrick, plaintiff as aforesaid; that he has heard read the foregoing complaint and knows
72 the contents thereof; that the same is true of his own knowledge except as to the matters and things therein stated on information or belief, and as to those that he believes it to be true.

GEO. H. N. LUHRS.

Subscribed & sworn to before me this 21st day of September, A. D. 1885.

C. H. KNAPP,
Clerk Dist. Court.

This indenture, made the tenth day of Nov. in the year of our Lord, one thousand eight hundred and eighty-three, between Wm. A. Hancock of Phœnix, Maricopa county, Arizona Territory, the party of the first part and Guss Ellis & Co. of the same place the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of ten hundred, eight and $\frac{60}{100}$ dollars lawful money of the United States of America, to him in hand paid, doth grant, bargain, sell and convey unto the

said party of the second part, and to their heirs and assigns forever, all that certain piece or parcel of land, situate in the count of Maricopa, Territory of Arizona, bounded and described as follows: Lots fifteen (15), 16 (16), seventeen (17) and eighteen in block No. (77) seventy-seven in the city of Phœnix in said county and Territory as appears by the plat of said city of Phœnix on file in the office of the county recorder of Maricopa county.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

This conveyance is intended as a mortgage to secure payment of a certain promissory note in the words and figures following:

73 $1,008.60. PHŒNIX, A. T., *Nov.* 1*st*, 1883.

On the first day of July 1884 for value received, I promise to pay to the order of Guss Ellis & Co. ten hundred and eight $\frac{60}{100}$ dollars with interest at the rate of one and one-half of one per cent. per month from date until paid.

WM. A. HANCOCK.

And these presents shall be void, if such payment be made, according to the tenor and effect thereof. But in case default be made in the payment of the principal or interest, as in said note provided, then the said parties of the second part, their executors, administrators and assigns are hereby empowered to sell the said premises with all and every of the appurtenances, or any part thereof, in the manner prescribed by law; and out of the money arising from such sale, to retain the said principal and interest, together with the costs and charges of making such sale, and ten per cent., for attorneys' fees; and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs and assigns.

In witness whereof, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

WM. A. HANCOCK. [SEAL.]

Signed, sealed, and delivered in the presence of—

——— ———.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

On this tenth day of November, in the year of our Lord one thousand eight hundred and eighty-three, before me, C. A. Tweed, a notary public in and for said county of Maricopa, personally
74 appeared Wm. A. Hancock, known to me to be the person whose name is subscribed to the said annexed instrument, who then duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.] C. A. TWEED,
Notary Public.

(Endorsed:) Mortgage. Wm. A. Hancock to Guss Ellis & Co. Dated Nov. 10th, 1883. Recorded, at the request of J. M. Ellis, Nov. 12th, A. D. 1883, at 10 min. past 9 a. m., in Book 2 of Mortgages, pages 620 & 621. Neri Osborn, county recorder, by W. R. Morris, deputy.

This indenture, made the seventeenth day of December in the year of our Lord, one thousand eight hundred and eighty-three, between William A. Hancock and Lily B. Hancock his wife both of the city of Phœnix, county of Maricopa and Territory of Arizona parties of the first part and Newell Herrick and George H. N. Luhrs, partners doing business under the firm name of Herrick & Company, the parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of sixteen hundred and two $\frac{90}{100}$ ($1,602.90) dollars *dollars* lawful money of the United States of America, to them in hand paid, do grant, bargain, sell and convey unto the said party of the second part, and to their heirs and assigns forever, all that certain piece or parcel of land, situate in the county of Maricopa, Territory of Arizona, bounded and described as follows: Lots numbered fourteen (14), fifteen
75 (15), sixteen (16), seventeen (17) and eighteen (18) in block numbered seventy-seven (77) in the city of Phœnix, according to the map or plat of said city of Phœnix, made be William A. Hancock surveyor of the town site of said city of Phœnix, and which said map or plat is on file in the office of the county recorder of the county of Maricopa in the Territory of Arizona, to which said map or plat reference is here made for more particular description of the said lots — block as to size and location; the said lot No. fourteen (14) being the same upon which the said parties of the first part now reside and the other lots lying south thereof and in the order of their numbers. Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

This conveyance is intended as a mortgage to secure payment of a certain promissory note of even date herewith which said promissory note is in the words and figures following, to wit:

$1,602.90. PHŒNIX, A. T., *December* 17, 1883.

On the first day of August A. D. one thousand eight hundred and eighty-four, without grace and for value received we or either of us promise to pay to the order of Herrick & Company the sum of sixteen hundred and two $\frac{90}{100}$ dollars with interest thereon at the rate of one and one-half of one per cent. per month from date until paid.

WM. A. HANCOCK.
LILLY B. HANCOCK.

And these presents shall be void, if such payment be made, according to the tenor and effect thereof. But in case default be made in the payment of the principal or interest, as in said promissory note provided, then the said parties of the second part, their executors, administrators and assigns are hereby empowered to sell the

said premises with all and every of the appurtenances, or any
76 part thereof, in the manner prescribed by law; and out of the money arising from such sale, to retain the said principal and interest, together with the costs and charges of making such sale, and ten per cent. for attorneys' fees; and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said parties of the first part, their *his* heirs and assigns.

In witness whereof, the said parties of the first part, have hereunto set their hands and seals the day and year first above written.

WM. A. HANCOCK. [SEAL.]
LILLY B. HANCOCK. [SEAL.]

Signed, sealed, and delivered in the presence of—

—— ——.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

On this seventeenth day of December, in the year of our Lord one thousand eight hundred and eighty-three, before me, John T. Alsap, a notary public in and for the county of Maricopa, in the Territory of Arizona, personally appeared William A. Hancock and Lily B. Hancock, his wife, both personally known to me to be the persons described in and who executed the said foregoing instrument as parties thereto, and they and each of them acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned; and the said Lily B. Hancock, wife of the said William A. Hancock, having been by me examined separate and apart from and without the hearing of her said husband and the contents of the said foregoing instrument having been by me made known to her and explained to her, she, after such explanation and upon said examination, acknowledged to me that she executed the said foregoing instrument freely and voluntarily without fear,
77 coercion, or compulsion on the part of her said husband, and that she did not wish to retract the execution of the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.] JOHN T. ALSAP.

(Endorsed:) Mortgage. William A. Hancock & Lilly B. Hancock to Newell Herrick & George H. N. Luhrs. Dated December 17, 1883. Recorded, at the request of N. Herrick, Dec. 17, A. D. 1883, at 2 o'clock p. m., in 3 of Mortgages, pages 3, 4. Neri Osborn, county recorder, by W. R. Morris, deputy.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

NEWELL HERRICK and GEORGE H. N. Luhrs, Copartners, Doing Business under the Firm Name and Style of Herrick & Company, Plaintiffs, *vs.* WILLIAM A. HANCOCK, LILLY B. HANCOCK, Wife of William A. Hancock, and Charles A. Tweed, Assignee of William A. Hancock, Defendants.	No. 533. Summons. Filed November 20, 1885. C. H. Knapp, Clerk, by Henry Bernard, Deputy Clerk.

Action brought in the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa and the complaint filed in said county of Maricopa in the office of the clerk of said district court.

The Territory of Arizona sends greeting to William A. Hancock, Lilly B. Hancock, wife of William A. Hancock, and Charles A. Tweed, assignee of William A. Hancock, defendants:

78 You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff- in the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa and answer the complaint filed with the clerk of this court, at Phœnix, in said county (a copy of which complaint accompanies this summons), within twenty days (exclusive of the day of service) after the service upon you of this summons, if served in this county, but if served out of the county and within this district, then within thirty days, in all other cases forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to obtain a judgment and decree of this court for the foreclosure and sale of certain mortgaged premises mentioned and described in the complaint on file herein, for attorneys' fees, costs of suit, and other and further relief, as will fully appear from the complaint on file herein, to which reference is here made.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiffs will apply to the court for the relief demanded therein and costs and disbursements in this behalf expended.

Given under my hand and the seal of the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa this 22nd day of September, A. D. 1885.

C. H. KNAPP,

[COURT SEAL.] *Clerk of said District Court.*

OFFICE OF THE SHERIFF OF THE COUNTY OF MARICOPA.

79 I hereby certify that I received the within summons on the 20th day of November, A. D. 1885, and personally served the

same on the 20th day of November, A. D. 1885, on C. A. Tweed, the assignee of Wm. A. Hancock, he being one of the defendants named in said summons, by delivering to said defendant personally, in the city of Phœnix, county of Maricopa, a copy of said summons and a true and correct copy of the complaint in the action named in said summons attached to said copy of summons.

Dated this 20th day of November, A. D. 1885.

N. M. BROADWAY, *Sheriff.*

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

NEWELL HERRICK and GEORGE H. N. Luhrs, Copartners, Doing Business under the Firm Name and Style of Herrick & Company, Plaintiffs,

vs.

WILLIAM A. HANCOCK, LILLY B. HANCOCK, Wife of William A. Hancock, and Charles A. Tweed, Assignee of William A. Hancock, Defendants.

No. 533. Summons. Filed September 23rd, 1885. C. H. Knapp, Clerk.

Action brought in the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa, and the complaint filed in said county of Maricopa, in the office of the clerk of said district court.

The Territory of Arizona sends greeting to William A. Hancock, Lilly B. Hancock, wife of William A. Hancock, and Charles A. Tweed, assignee of William A. Hancock, defendants:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiffs in the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa and answer the complaint
80 filed with the clerk of this court, at Phœnix, in said county (a copy of which complaint accompanies this summons), within twenty days (exclusive of the day of service) after the service upon you of this summons, if served in this county, but if served out of the county and within this district, then within thirty days, in all other cases forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to obtain a judgment and decree of this court for the foreclosure and sale of certain mortgaged premises mentioned and described in the complaint on file herein, for attorneys' fees, costs of suit, and other and further relief, as will fully appear from the complaint on file herein, to which reference is here made.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiffs will apply to the court for the relief demanded therein and costs and disbursements in this behalf expended.

Given under my hand and the seal of the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa this 22nd day of September, A. D. 1885.

[Dist. Court Seal.]

C. H. KNAPP,
Clerk of said District Court.

OFFICE OF THE SHERIFF OF THE COUNTY OF MARICOPA.

I hereby certify that I received the within summons on the 22nd day of September, A. D. 1885, and personally served the same on the 23d day of September, A. D. 1885, on W. A. Hancock and Lilly B. Hancock, wife of W. A. Hancock, being two of the defend-
81 ants named in said summons, by delivering to them, the said defendants, personally, in the city of Phœnix, county of Maricopa, a copy of said summons and a true and correct copy of the complaint in the action named in said summons attached to said copy of summons.

Dated this 23rd day of September, A. D. 1885.

N. M. BROADWAY, *Sheriff*,
By J. W. BLANKENSHIP,
Deputy Sheriff.

In the District Court, Second Judicial District, Territory of Arizona, in and for the County of Maricopa.

N. HERRICK and G. H. LUHRS, Partners, Doing Business under the Firm Name of Herrick & Co.,	No. 533. Demurrer. Service by Copy Admitted This 9th Day of October, 1885.
vs.	A. C. Baker, Att'y for Pl'ff. Filed Oct. 9th, 1885. C. H. Knapp, Clerk.
WM. A. HANCOCK & LILLIE B. HANCOCK and C. A. Tweed, Defendants.	

Now comes the defendants and demurs to the complaint in this action and alleges for cause of demurrer:

1st. That the complaint does not state facts sufficient to constitute a cause of action.

LOUIS H. CHALMERS,
Att'y for Defendants.

J. A. ANDERSON, *Of Counsel.*

82 District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

NEWELL HERRICK and GEORGE H. N. Luhrs, Copartners, Doing Business under the Firm Name and Style of Herrick & Co., Plaintiffs,
vs.
WILLIAM A. HANCOCK, LILLY B. HANcock, Wife of William A. Hancock, and Charles A. Tweed, Assignee of William A. Hancock, Defendants.

No. 533. Answer. Service of the Within Acknowledged by Receipt of Copy. A. C. Baker. Filed Oct. 21, 1885. C. H. Knapp, Clerk, by L. E. Barbey, Deputy.

The defendants William A. Hancock and Lilly Hancock, wife of said William A. Hancock above named, for answer to the first cause of action set out in the complaint of the above-named plaintiffs on file herein, say:

I.

That the plaintiffs ought not to be permitted to set up the said mortgage mentioned and described in the 3rd paragraph of the said first cause of action *or* against these defendants, and should not be permitted to have a decree of foreclosure thereon against these defendants, because on the 10th day of November, 1883 (the day of the date of said mortgage and the day on which the same was acknowledged and delivered), and long before that time the said defendant, William A. Hancock, and the said defendant, Lillie Hancock, were united in the bonds of matrimony and were at that time and ever since have been living together as man and wife, and that on the said 10th day of November, and for some time prior thereto, the said defendants were occupying as their homestead & residence lots Nos. fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block No. 77, in the city of Phœnix, county of Maricopa, according to the
83 map of said city of Phœnix, made by Wm. A. Hancock, surveyor of the town site of said city of Phœnix, now on file in the office of the recorder of said county; that the dwelling-house of said defendants was on said 10th of November, 1883, situated on said lots Nos. 14 & 15 and now is, and all of said lots 14, 15, 16, 17, & 18 were enclosed at that time (and now are so enclosed) as one lot or homestead, and were then and now are used as a homestead by these defendants, and all of said lots are appurtenant to their said dwelling-house, and were on the said 10th *od* November, 1883, so appurtenant; that the said dwelling-house and said five lots appurtenant thereto and enclosed therewith *are* so used and claimed as a homestead by these defendants were not on the 10th of November, 1883, and are not now and have not since been of a value greater than four thousand dollars; that the said mortgage mentioned & described in said complaint in setting out its first cause of action, and a copy of which is annexed to said complaint as Exhibit "A," was executed and delivered by defendant William A. Hancock without the signature of his said wife, defendant Lillie Hancock;

that there is covered by & included in said mortgage a part of said homestead of these defendants, to wit, said lots 15, 16, 17, & 18 of said block 77.

II.

These defendants for a further defense by way of cross-complaint to plaintiffs' first cause of action allege & say that on the 10th of November, 1883, and a long time prior thereto the defendants W. A. Hancock & Lilly Hancock were united in wedlock, and were then and ever since have been living together as man & wife, and that on the 10th of November, 1883, & for some — prior thereto and ever since these defendants were occupying as their homestead &
84 residence lots No. 14, 15, 16, 17, & 18, in bl'k No. 77, in the city of Phœnix, county of Maricopa, according to the map of the said city of Phœnix, made by Wm. A. Hancock, surveyor of the town site of said city of Phœnix, now on file in the office of the recorder of said county; that the dwelling-house of these defendants was the 10th of November, 1883, situated on said lots No. 14 & 15, and now is, and all of said lots 14, 15, 16, 17, & 18 were enclosed at that time (and now are so enclosed) as one lot or homestead, and were then and now are used as one homestead and residence by these defendants, and all of said lots are appurtenant to their said dwelling-house & were so appurtenant on the 10th of November, 1883; that the said dwelling-house and the said five lots appurtenant thereto *are* enclosed therewith and so used and claimed as a homestead by these defendants were not on the 10th of November, 1883, and are not now and have not since been of a value greater than four thousand dollars; that on the 10th of November, 1883, defendant William A. Hancock executed & delivered a mortgage, a copy of which is annexed to plaintiffs' complaint as exhibit; that said mortgage was executed and delivered by defendant William A. Hancock without the signature of his said wife, defendant Lillie Hancock; that there is covered by and is included in said mortgage a part of said homestead of these defendants, to wit, said lots 15, 16, 17, & 18 of said bl'k 77.

III.

That the said plaintiffs in the complaint on file in this cause claim to be the owners of said mortgage, and are now seeking in this action to have the same foreclosed as to said lots composing a part of the homestead of these defendants against these defendants.

IV.

That the said mortgage and the said claim of said plaintiffs
85 and the said first cause of action in plaintiffs' complaint are claims upon the said homestead of these defendants, and interferes with the quiet use, benefit, and enjoyment of said homestead by these defendants.

Wherefore these defendants pray & demand that the said dwelling-house & the said five lots appurtenant thereto be adjudged to be their homestead, and that it be adjudged and decreed that said

mortgage & said claim of plaintiffs and said first cause of action in plaintiffs' complaint are clouds upon the said homestead of these defendants, and that plaintiffs be forever enjoined from selling of and attempting to foreclose said mortgage against the said homestead of these defendants, or any part thereof, and from proceeding with their said first cause of action in said complaint set forth, & for such other & further relief as may seem meet — proper in the premises.

J. A. ANDERSON &
LOUIS H. CHALMERS,
Attorneys for Defendants Wm. A. & Lillie Hancock.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Lillie Hancock, being duly sworn, says: That I am one of the defendants in the above-entitled action; that I have heard read the foregoing answer and know the contents thereof, and that it is true of my own knowledge except as to matters therein stated on information and belief, and as to these matters I believe them to be true.

LILLIE HANCOCK.

Subscribed and sworn to before me this 20th day of October, A. D. 1885.

[NOTARY SEAL.] R. E. SLOAN,
Notary Public.

86 In the District Court, Second Judicial District, Territory of Arizona, in and for the County of Maricopa.

NEWELL HERRICK & Co.	Demurrer. Filed Dec. 8, 1885. C. H. Knapp, Clerk, by L. E. Barbey, Deputy. Service of the within Acknowledged by Receipt of Copy Dec. 8th, 1885. A. C. Baker. H. N. Alexander.
vs.	
WM. A. HANCOCK, LILLIE B. HANCOCK, and C. A. Tweed, Assignee, Def't-.	

Now comes the defendant C. A. Tweed, by his attorney, and demurs to the complaint on file herein, and for cause of demurrer alleges:

1st. That the complaint on file herein does not state facts sufficient to constitute a cause of action.

LOUIS H. CHALMERS,
Att'y for Def't C. A. Tweed.

87 In the District Court of the Second Judicial District, Territory of Arizona, in and for the County of Maricopa.

NEWELL HERRICK and GEORGE H. N. Luhrs, Copartners, &c., Plaintiffs, *against* WM. A. HANCOCK, LILLY B. HANCOCK, *et als.*, Defendants.	No. 533. Plaintiff's Reply. Rec'd Copy of the within Reply this 16th Day of Oct., 1888. L. H. Chalmers, Def'ts 'Att'y. Filed Oct. 16th, 1888. J. E. Walker, Clerk.

And now come the said plaintiffs, by their attorneys, H. N. Alexander and H. B. Lighthizer, and, by way of reply to the separate answer of the defendants Wm. A. Hancock and Lilly B. Hancock, his wife, to the first cause of action in said plaintiff's complaint contained, say:

I.

That the plaintiffs except to the sufficiency of the said answer as a separate answer by the defendant Wm. A. Hancock on the following grounds, viz:

1st. That said answer does not state facts sufficient to constitute a defense for him, the defendant Wm. A. Hancock, for the reason that the homestead privilege, if any existed, as pleaded by him was not, under the statute law in force at the date of the mortgage deed of November 10th, 1883, a title in the husband and wife, but was a personal privilege accruing, in this instance, because of its waiver by the husband, to the wife alone.

2nd. That the defendant Wm. A. Hancock, by his mortgage deed of date aforesaid, is estopped from claiming the property therein named as a homestead as against the debt thereby secured
88 and from denying his full right to convey the whole of said property.

3rd. That the defendant Wm. A. Hancock is not permitted to take advantage of his own wrong by pleading the same as a defense in an equitable action.

Whereof the plaintiffs ask the judgment of the court.

II.

And the said plaintiffs, further replying to said answer as the separate answer of the defendant Lilly B. Hancock, allege:

I. That said mortgage deed of date Nov. 10th, 1883, conveying lots Nos. 15, 16, 17, and 18, in block (77) seventy-seven, in the city of Phœnix, was made, executed, acknowledged, and delivered by the defendant Wm. A. Hancock to Gus Ellis & Co., the mortgagees therein named, with the full knowledge, consent, connivance, and procurement of the said Lilly B. Hancock, defendant.

II. That the said defendant, Lilly B. Hancock, with full knowledge, as aforesaid, of the existence of said mortgage deed of Nov. 10th, 1883, did, on or about the 17th day of December, 1883, make, execute, and acknowledge her certain mortgage deed of date last aforesaid, as particularly set forth in the second cause of action in

plaintiffs' complaint herein, and delivered the same to these plaintiffs as mortgagees, conveying to them lots Nos. 14, 15, 16, 17, and 18, in said block 77, in the city of Phœnix, and did by express terms therein designate said lot No. 14 as her then residence or homestead, and did neglect and omit so to designate said lots Nos. 15, 16, 17, and 18 (the four lots conveyed by said prior mortgage deed of Nov. 10th, 1883, by her husband, the defendant Wm. A. Hancock) as being included in her homestead or occupied by her as a residence.

III. That these plaintiffs were led to believe from the aforesaid recitals of said defendant Lilly B. Hancock's mortgage deed of date December 17th, 1883, and from her acts and declarations in connection with the execution and acknowledgement thereof and its delivery to them as mortgages that said lot No. 14, in block 77, of the city of Phœnix was alone selected and claimed by her as a residence and constituted the whole of her homestead under the law, and that said lots Nos. 15, 16, 17, and 18, in said block 77, included, as aforesaid, in both the mortgage deeds of November 10th, 1883, and of December 17th, 1883, were neither occupied by her and her husband as a residence nor claimed by her as a homestead.

IV. That by reason of the aforesaid recitals, acts, and declarations of the defendant Lilly B. Hancock confining her homestead claim to said lot No. 14 the plaintiffs were induced to believe and did believe that said mortgage deed of Nov. 10th, 1883, was a valid prior lien on said lots Nos. 15, 16, 17, and 18, and that it was for the interest of the plaintiffs, as the holders of the second lien thereon under the said mortgage deed of December 17th, 1883, to purchase said prior lien, and that accordingly the plaintiffs did, on the 28th day of February, 1885, in good faith and so, as aforesaid, believing it to be a first lien on said four lots last above named, purchase of Guss Ellis & Co., the mortgagees therein, the said mortgage deed of date November 10th, 1883, paying therefor the full face value of the debt thereby secured and taking said mortgagees' assignment thereof, and that these plaintiffs are now the lawful owners and holders of said last-named mortgage deed and of the debt thereby secured.

Wherefore plaintiffs say that by reason of the premises the defendant Lilly B. Handock is estopped from denying the validity of said mortgage deed of November 10th, 1883, as against these plaintiffs, and from claiming said lots Nos. 15, 16, 17, and 18, in said block 77, in the city of Phœnix, as her homestead as against the indebtedness secured by said mortgage deed.

H. N. ALEXANDER &
H. B. LIGHTHIZER,
Attorneys for Plaintiffs.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

NEWELL HERRICK and GEORGE H. N. Luhrs, Copartners, &c., Plaintiffs, *vs.* WILLIAM A. HANCOCK and LILLIE B. HANCOCK, *et al.*, Defendants.	Demurrer to Plaintiffs' Reply. Filed Nov. 24th, 1888. J. E. Walker, Clerk.

And now come the defendants, by P. S. Perley and M. H. Williams, their attorneys, and demur to plaintiffs' reply to the separate answer of defendant Lillie B. Hancock for insufficiency in not stating facts sufficient in law to constitute a reply or plea of estoppel.

And they further demur to the same because they say it is a departure in pleading from the complaint. It alleges knowledge and connivance and procurement of the execution of the mortgage of Nov. 10, 1883, on the part of Lillie B. Hancock, and alleges acts and omissions and declarations of her expressly confining or restricting her homestead claim, and attempts by a restatement of the assignment of said mortgage and of the recitals of the mortgages set out in the complaint, and by stating what they were so led to believe and did believe, to make out a new case, which cannot be done in the replication, but must be by an amendment to the complaint. Defendants therefore move the court to strike it out. Wherefore they pray judgment, etc.

P. S. PERLEY AND
M. H. WILLIAMS,
Attorneys for Defendants.

91 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

NEWELL HERRICK & GEO. H. N. LUHRS, Plaintiffs, *against* WM. A. HANCOCK, LILLY B. HANCOCK, & Others, Defendants.	Supplemental Complaint. Rec'd Copy of the within this 15th Oct., 1891. P. S. Perley, Def'ts' Att'y. Filed October 19th, 1891. C. H. Knapp, Clerk.

And now come the above-named plaintiffs, by H. N. Alexander and H. B. Lighthizer, Esquires, their attorneys, and, by leave of court first has and obtained, file this their supplemental complaint or answer to the cross-complaint or separate answers of the defendants Wm. A. Hancock and Lilley B. Hancock, his wife, herein, and allege:

I.

That they, the said plaintiffs, deny each and every allegation in the said separate answer or cross-complaint of the said defendants, Wm. A. Hancock and Lilly B. Hancock, his wife, contained.

II.

And the said plaintiffs, further answering the allegations of the aforesaid separate answer or cross-complaint of the said defendants, Wm. A. Hancock and Lilley B. Hancock, his wife, herein, allege:

That whatever homestead rights the said defendants may have had in and to lots fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block seventy-seven (77), of the city of Phœnix, at the date of the execution of the note and mortgage particularly set forth and described in plaintiffs' first cause of action herein was by the said defendants, Wm. A. Hancock, subsequently thereto and since the commencement of this action, viz., on the 19th day of
92 June, 1888, abandoned and wholly surrendered, for that on the date last aforesaid the said Wm. A. Hancock, defendant, did file in the Land Office of the United States, at the local office thereof at Tucson, in the Territory of Arizona, soldiers' homestead declaration No. 1061 on the northwest quarter of section numbered twenty-seven (27), in township numbered one (1) north, of range numbered three (3) east, of the Gila and Salt Rivers base and meridian, in the county of Maricopa and Territory of Arizona, and did thereupon, in conformity with the terms of said homestead declaration and in compliance with the homestead laws of the United States, take up his residence upon said last above described piece or parcel of land, accompanied by his said wife, and did continue to reside thereon for a period of six months or more continuously, or for such time as was necessary to perfect his, the defendant Wm. A. Hancock's, title to said last-described tract of land under the aforesaid homestead laws of the United States, and that upon the 11th day of January, 1890, the said Wm. A. Hancock, defendant, completed his title to said tract of land under his aforesaid homestead entry thereon by proof of settlement thereon and occupation thereof, and obtained his final receipt, of date last aforesaid, entitling him to a United States patent for said land, said receipt being cash entry numbered 696, or a commutation of said defendant Wm. A. Hancock's aforesaid homestead entry on said land.

Wherefore plaintiffs demand judgment against the defendants as in their original complaint set forth.

H. N. ALEXANDER &
H. B. LIGHTHIZER,
Attorneys for Plaintiffs.

93 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

NEWELL HERRICK & GEO. H. N. Luhrs, Plaintiffs, *against* WILLIAM A. HANCOCK, LILLEY B. Hancock, *et al.*, Defendants.	No. 533. Plaintiffs' Verification of Supplemental Complaint. Filed Nov. 18th, 1891. C. H. Knapp, Clerk, by J. H. Stout, Deputy.

TERRITORY OF ARIZONA, }
County of Maricopa. }

Geo. H. N. Luhrs, being first duly sworn, on oath states:

That he is one of the plaintiffs in the above-entitled action and has read the supplemental complaint filed therein by plaintiffs on the 15th day of October, 1891, and knows the contents thereof, and the same is true of his own knowledge except the matters therein stated on information and belief, and that as to those matters he believes it to be true.

GEO. H. N. LUHRS.

Subscribed & sworn to before me this 18th day of Nov., 1891.

H. B. LIGHTHIZER,
Notary Public.

[NOTARY SEAL.]

94 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

NEWELL HERRICK ET AL. *vs.* WILLIAM A. HANCOCK ET AL.	No. 533. Answer. I acknowledge receipt of copy this 26th day of Feb'y, 1892. H. B. Lighthizer, Att'y for Pl'ffs. Filed Feb'y 26th, 1892. C. H. Knapp, Clerk, by J. H. Stout.

And the defendants come and demur to the said complaint and supplemental complaint as to the first cause of action in said complaint and say that it is insufficient in law, and, further answering, they deny each and every allegation in the complaint and supplemental complaint contained as to the said first cause of action alleged therein.

And, further answering, they say that on February 27, 1886, the said W. A. Hancock, in consideration of his "love and affection" for said L. B. Hancock, gave, granted, aliened, conveyed, and confirmed unto her, her heirs and assigns, all his right, title, and interest in and to all the said lots of land described in said complaint and their hereditaments and appurtenances, and the rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever of him of, in, and to the said premises; to have and to hold to her, her heirs and assigns, to her and their only use and behoof forever; that he so gave and conveyed said lots to her, as aforesaid, by his deed to her of that date duly made, executed,

and delivered by him to her, which was duly recorded on March 6, 1886, in Book 12 of Deeds, pages 359 & 360, in the recorder's office of Maricopa county, A. T., at her request.

P. S. PERLEY,
Att'y for Defendants.

95 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

NEWELL HERRICK and GEORGE H. N. Luhrs, Copartners, Doing Business under the Firm Name of Herrick & Luhrs, Plaintiffs,
against
WILLIAM A. HANCOCK, LILLY B. HANCOCK, and Charles A. Tweed, Assignee of William A. Hancock, Defendants.

No. 533. Judgment of Foreclosure. Filed March 7th, 1892, at 11 o'clock a. m. C. H. Knapp, Clerk.

This cause having come on regularly for trial on the 25th day of February, 1892, was tried by the court upon the issues raised by the pleadings, Messrs. H. N. Alexander and H. B. Lighthizer appearing for the plaintiffs and Messrs. Hancock & Perley appearing for defendants.

The court, having heard the proofs, documentary and oral, offered by the respective parties and the arguments of counsel thereon, and duly considered the same, orders judgment for the plaintiffs as follows:

1. That on the note of date Nov. 1st, 1883, executed by the defendant William A. Hancock to the order of Guss Ellis & Co., and by them assigned to plaintiffs, as set forth in the first cause of action in plaintiffs' complaint, the plaintiffs recover of the defendant William A. Hancock the amount found to be due on said note at this date, viz., the sum of one thousand and eight dollars and sixty cents ($1,008.60), with interest, at the rate of 1½ per cent. per month, from said Nov. 1st, 1883, and amounting, principal and interest,
96 to the sum total of two thousand five hundred and twenty-four dollars and two cents ($2,524.02).

2. That on the note and mortgage of date Dec. 17th, 1883, executed by the defendants William A. Hancock and Lilly B. Hancock, his wife, and payable to the order of Herrick & Co., as set forth in the second cause of action in the complaint, the plaintiffs recover of the said defendants, William A. Hancock and Lilly B. Hancock, the amount found to be due on said note at this date, viz., the sum of nine hundred and forty-two dollars and eighty-three cents ($942.83), with interest thereon, at the rate of 1½ per cent. per month, from the 30th Sept., 1884, and amounting, principal and interest, to the sum, total of two thousand two hundred and three dollars and thirty-seven cents ($2,203.37), and that the plaintiffs' lien on the property described in said mortgage be foreclosed.

Now, therefore, it is ordered, adjudged, and decreed that the plaintiffs, Newell Herrick and George H. N. Luhrs, have and recover of

the defendant William A. Hancock the sum of two thousand five hundred and twenty-four dollars and two cents ($2,524.02), with interest thereon, at the rate of one and one-half of one (1½) per cent. per month, from the date hereof until paid, and that said plaintiffs have execution therefor.

And, further, that the said plaintiffs, Newell Herrick and George H. N. Luhrs, have and recover of the defendants William A. Hancock and Lilly B. Hancock, his wife, the sum of two thousand two hundred and three dollars and thirty-seven cents ($2,203.37), with interest thereon, at the rate of one and one-half (1½) of one per cent. per month, from the date hereof until paid, and the further sum of ($220.33) two hundred and twenty dollars and thirty-three cents, attorneys' fees, together with plaintiffs' costs and disburse-
97 ments in this action, allowed and taxed at the sum of fifty-eight and $^{45}_{100}$ dollars.

And it is further ordered, adjudged, and decreed that all and singular the mortgaged and encumbered property mentioned in the said second cause of action in the plaintiff's complaint and hereinafter particularly described, or so much thereof as may be necessary to raise the amount so, as aforesaid, found to be due the plaintiffs from the said defendants, William A. Hancock and Lilly B. Hancock, on the debt and mortgage particularly stated and set forth in said second cause of action, viz., the sum of two thousand two hundred and three dollars and thirty-seven cents ($2,203.37), with interest thereon, at the rate of one and one-half of one (1½) per cent. per month, from the date hereof until paid, together with two hundred and twenty dollars and thirty-three cents ($220.33), attorneys' fees, and fifty-eight and $^{45}_{100}$, dollars, costs of suit, as aforesaid, and the expenses of sale, be sold at public auction by the sheriff of the county of Maricopa, where said mortgaged premises are situated; that said sale be made at the court-house door of said county, and that the sheriff give public notice of the time and place of such sale, according to the course and practice of this court and the law relative to the sale of real estate under execution, and that the proceeds of such sale, after deducting therefrom the expenses of sale, be applied to the payment of the aforesaid judgment against the defendants William A. Hancock and Lilly B. Hancock, viz., the said sum of $2,203.37, and interest thereon, attorneys' fees, and costs of suit, as aforesaid, and if the proceeds of such sale be insufficient for the purposes aforesaid that the sheriff shall proceed to make the deficiency, when ascertained, out of any other property of the defendants William A. Hancock and Lilly B. Hancock as in cases of ordinary execution.

98 And it is further ordered and decreed that said sheriff, after the statutory time for redemption shall have expired, shall execute and deliver to the purchaser or purchasers of said mortgaged premises or their assigns good and sufficient deeds to the premises purchased at such sale, and that from and after the delivery of such deed or deeds the defendants and all persons claiming from or under them, and all persons having liens upon said mortgaged premises or upon any portion thereof subsequent to the mortgage aforesaid, and all persons claiming to have acquired any estate or

interest in said premises subsequent to the recording of said mortgage in the office of the county recorder of said Maricopa county, viz., the 17th day of December, 1883, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said premises or any part thereof so as aforesaid sold and conveyed by said sheriff.

The full description of the mortgaged premises authorized to be sold under and by virtue of this decree, as shown and ascertained from the mortgage set forth in the second cause of action contained in the complaint on file herein, is as follows, viz:

Lots numbered fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block numbered seventy-seven (77), in the city of Phœnix, county of Maricopa and Territory of Arizona.

Decree ordered in open court 5th day of March, A. D. 1892.

Signed 7th day of March, 1892, to operate *nunc pro tunc*.

HENRY C. GOODING, *Judge*.

99 PLAINTIFF'S EXHIBIT 2.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

The Territory of Arizona to the sheriff of the said county of Maricopa, Greeting:

Whereas, on the seventy day of March, 1892, Newell Herrick and George H. N. Luhrs recovered a judgment in the said district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa against William A. Hancock for the sum of two thousand five hundred twenty-four and $\frac{2}{100}$ dollars ($2,524.02), with interest, at the rate of 1½ per cent. per month, till paid, together with costs and disbursements at the date of said judgment and accruing costs, amounting to $2.00, as appears to us of record;

And whereas the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court, in the said county of Maricopa, and the said judgment was docketed in said clerk's office in the said county on the day and year first above written;

And the sum of $2,524.02, with interest, as aforesaid, and accruing costs, as aforesaid, is now (at the date of this writ) actually due on said judgment:

Now, you, the said sheriff, are hereby required to make the said sum due on the said judgment, with interest, as aforesaid, and costs and accruing costs, to satisfy the said judgment out of the personal property of said debtor, or if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging — Wm. A. Hancock on the day whereon said judgment was docketed in the said county, or at any time thereafter, and
100 make return of this writ within 90 days after your receipt hereof, with what you have done endorsed hereon.

Witness Hon. Henry C. Gooding, judge of said second judicial dis-

trict of the Territory of Arizona, at the court-house, in the said county of Maricopa, this 5th day of April, A. D. 1892.

Attest my hand and the seal of said court the day and year last above written.

C. H. KNAPP, *Clerk.*

[COURT SEAL.] By J. H. STOUT, *Dep. Clerk.*

Items of Cost Bill.

Clerk's fees accruing..... $2.00

The sheriff will levy the within execution on lots numbered fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block 77, city of Phœnix.

Dated April 5th, 1892.

—— LIGHTHIZER,
Att'y for Plaintiffs.

OFFICE OF THE SHERIFF OF MARICOPA COUNTY.

I hereby certify that by virtue of the within execution I have this day levied upon all the right, title, claim, and interest of the within-named defendant, Wm. A. Hancock, in and to the following-described real property situate in Maricopa county, Arizona, to wit: Lots numbered fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block 77, in the city of Phœnix.

Dated April 6th, 1892.

JOHN B. MONTGOMERY, *Sheriff.*
By A. BARRY, *Deputy.*

(Execution. Filed July 6th, 1892. C. H. Knapp, clerk, by J. H. Stout, deputy clerk.)

101 PLAINTIFF'S EXHIBIT 3.

OFFICE OF THE SHERIFF OF MARICOPA COUNTY.

I hereby certify that by virtue of the annexed execution I levied upon all the right, title, claim, and interest of the defendant William A. Hancock in and to the following-described property situate in Maricopa county, Arizona, to wit, lots numbered fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block 77, in the city of Phœnix, and advertised the same to be sold by me at the court-house door, in the city of Phœnix, Maricopa county, Arizona, at 12 o'clock m., on Saturday, the 2nd day of July, 1892, by causing notices of said sale to be published for three weeks successively immediately preceding said sale in the Arizona Republican, a newspaper published in said city, and also by causing notices thereof to be posted in three of the most public places in said city for the same period; that I attended at the time and place so fixed for said sale and exposed said premises for sale at public auction to the highest bidder for cash in United States lawful money, when George H. N. Luhrs bid the sum of two thousand seven hundred and seventy-five and $\frac{50}{100}$ dollars. I knocked off said premises to said George H. N.

Luhrs for said sum, which was the highest price bid and which I acknowledge to have received; and I further certify that out of the said sum of $2,775.50 I retained my fees, disbursements, and commissions, amounting to the sum of $104.35, and paid the balance, amounting to $2,671.15, to the plaintiff in full satisfaction of his judgment, and that I delivered to said purchasers a certificate of said sale and filed a duplicate thereof in the office of the county recorder.

Dated July 2nd, 1892.

JOHN B. MONTGOMERY, *Sheriff.*

Received of John B. Montgomery, sheriff, the sum of two thousand six hundred and seventy-one and $\frac{15}{100}$ dollars in full of judgment in case No. 533, entitled Newell Herrick and George H. N. Luhrs *vs.* William A. Hancock, in the Maricopa Co., Arizona, district court.

Dated July 2nd, 1892.

HERRICK & LUHRS,
By GEO. H. N. LUHRS.

102 PLAINTIFF'S EXHIBIT 4.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

NEWELL HERRICK and GEORGE H. N. Luhrs, Plaintiff-,	Sheriff's Certificate of Sale of Real Estate on Execution. Judgment Rendered on the Seventh Day of March, A. D. 1892. Filed May 10th, 1894. J. E. Walker, Clerk, by C. H. Knapp, Deputy Clerk. Filed (in the Supreme Court of the Territory of Arizona) Jan'y 9th, 1899. Lloyd Johnston, Clerk.
vs.	
WILLIAM A. HANCOCK, Defendant.	

I, John B. Montgomery, sheriff of the county of Maricopa, Territory of Arizona, do hereby certify that under and by virtue of an execution in the above cause, duly attested the fifth day of April, A. D. 1892, by which I was commanded to make the amount of two thousand five hundred and twenty-four and $\frac{62}{100}$ dollars to satisfy the judgment in this action, with interest thereon and costs, out of the personal property of the above defendant, William A. Hancock, and if sufficient personal property could not be found, then out of the real property belonging to the said defendant, William A. Hancock, on the seventh day of March, A. D. 1892, or at any time thereafter, as by the said writ, reference being thereunto had, more fully appears, I have levied on and this day sold at public auction, according to the statute in such case made and provided, to George H. N. Luhrs, who was the highest bidder, for the sum of two thousand seven hundred and seventy-five and $\frac{50}{100}$ dollars, which was the whole price paid by him for the same, the real estate described as follows, to wit, situate in Maricopa county, Arizona, and being lots numbered four-

teen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), in block 77, in the city of Phœnix, and that the said real estate is subject to redemption in six months pursuant to the statute in such case made and provided.

Given under my hand this second day of July, 1892.

JOHN B. MONTGOMERY. *Sheriff*,
By A. BARRY, *Deputy Sheriff*.

103 PLAINTIFF'S EXHIBIT 5.

This indenture, made the fourth day of February in the year of our Lord one thousand eight hundred and ninety-three, between John B. Montgomery formerly sheriff of the county of Maricopa, Territory of Arizona, the party of the first part, and George H. N. Luhrs, of said county of Maricopa, the party of the second part,

Whereas, by virtue of a writ of execution issued out of and under the seal of the district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, tested the fifth day of April, A. D. 1892, upon a judgment recovered in said court, on the seventh day of March, A. D. 1892, in favor of Newell Herrick and George H. N. Luhrs and against William A. Hancock, to the said sheriff directed and delivered, commanding him that out of the personal property of said judgment debtor in this county, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, then he should cause the amount of said judgment to be made out of the real property belonging to said judgment debtor on the seventh day of March, A. D. 1892, or at any time afterwards;

And whereas, because sufficient personal property of the said judgment debtor could not be found, whereof the said sheriff could cause to be made the moneys specified in said writ, the said sheriff did, in obedience to said command, levy on, take and seize all the right, title, interest and claim which the said judgment debtor so had to the lands, tenements, real estate, and premises hereinafter particularly set forth and described, with the appurtenances, and did, on the 2nd day of July, A. D. 1892, sell all the right, title, interest and claim of the said judgment debtor in and to the said premises, at public auction, in front of the court-house door in the city of Phœnix, in

104 said county of Maricopa, between the hours of nine in the morning and five in the afternoon of that day, namely, at 12 o'clock m., after having first given due notice of the time and place of such sale according to law; at which sale all the right, title, interest and claim of said judgment debtor, in and to the said premises, were struck off and sold to the said party of the second part, for the sum of two thousand seven hundred and seventy-five and 50/100 dollars, in lawful money of the United States of America, the said party of the second part being the highest bidder, and that being the highest sum bid for the same, whereupon the said sheriff, after receiving from the said purchaser the said sum of money so bid as aforesaid, gave to the said party of the second part such certificate of said sale as by law directed to be given, and a duplicate of such cer-

tificate was duly filed by the said sheriff in the office of the recorder of the county of Maricopa;

And whereas, six months after said sale have expired without any redemption of the said premises having been made;

Now, this indenture witnesseth: That the said John B. Montgomery the former sheriff aforesaid, by virtue of the said writ, and in pursuance of the statute in such case made and provided, for and in consideration of the said sum of money, to him in hand paid as aforesaid, by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed and confirmed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all the right, title, interest and claim which the said judgment debtor William A. Hancock had on the said 7th day of March, A. D. 1892, or at any time afterwards, or now has in and to all those certain lots, pieces or parcels of land situate, lying and being in the said county of Maricopa, and Territory of Ari-
105 zona, and bounded and particularly described as follows, to wit: Lots numbered fourteen (14) fifteen (15) sixteen (16) seventeen (17) & eighteen (18) in block (77) seventy-seven in the city of Phœnix.

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

To have and to hold the said premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever, as fully and absolutely as the said sheriff can, may or ought to, by virtue of the said writ, and of the statute in such case made and provided, grant, bargain, sell, convey and confirm the same.

In witness whereof, the sheriff, the said party of the first part, has hereunto set his hand and seal, the day and year first above written.

JOHN B. MONTGOMERY, [SEAL.]
Formerly Sheriff of the County of Maricopa, Territory of Arizona.

Signed, sealed, and delivered in the presence of—
NERI OSBORN.

TERRITORY OF ARIZONA, }
County of Maricopa, } *ss:*

On this 4th day of February, eighteen hundred and ninety-three, personally appeared before me, Neri Osborn, county recorder in and for Maricopa county, Arizona Territory, the within-named John B. Montgomery, formerly sheriff of the county of Maricopa, Territory of Arizona, known to me to be the person described in and whose name is subscribed to the within instrument, and he, the said John B. Montgomery, acknowledged to me that he, as such former sheriff of said county, executed the same for the purposes and consideration therein expressed.

106 In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the county of Maricopa,

Territory of Arizona, the day and year in this certificate first above written.

NERI OSBORN,

[RECORDER'S SEAL.] *County Recorder, Maricopa County, A. T.*

(Endorsed:) Deed. Sheriff, etc., to George H. N. Luhrs. Dated Feb. 4th, 1893. Filed for record at the request of George H. N. Luhrs February 4th, A. D. 1893, at 19 min. past 11 o'clock a. m., and recorded in vol. 33 of Deeds, page- 53 to 55, inc., Maricopa county records. Neri Osborn, recorder, by Wm. E. Thomas, deputy recorder.

TERRITORY OF ARIZONA, }
County of Maricopa. }

I, Neri Osborn, county recorder in and for county and Territory aforesaid, do hereby certify that the within instrument was filed for record at 11.19 o'clock a. m. on this 4th day of Feb., 1893, and duly recorded in Book No. 33 of Deeds, records of Maricopa county, Arizona, at pages 53 to 55, inc.

Witness my hand and official seal the day and year above written.

[RECORDER'S SEAL.] NERI OSBORN,
County Recorder.

Filed May 10th, 1894.

J. E. WALKER, *Clerk*,
By C. H. KNAPP,
Deputy Clerk.

Filed (in the supreme court of the Territory of Arizona) Jan'y 9th, 1899.

LLOYD JOHNSTON, *Clerk.*

107 (DEFENDANTS' EXHIBIT No. 1.)

This indenture, made the fourth day of January in the year of our Lord one thousand eight hundred and ninety-three,

Between James K. Murphy sheriff of the county of Maricopa, Territory of Arizona, the party of the first part, and George H. N. Luhrs, of said county of Maricopa, the party of the second part,

Whereas, by virtue of a writ of execution issued out of and under the seal of the district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, tested the fifth day of April A. D. 1892, upon a judgment recovered in said court, on the seventh day of March A. D. 1892, in favor of Newell Herrick and George H. N. Luhrs and against William A. Hancock to the said sheriff directed and delivered, commanding him that out of the personal property of said judgment debtor in this county, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, then he should cause the amount of said judgment to be made out of the real property belonging to said judgment debtor on the seventh day of March, A. D. 1892, or at any time afterwards;

And whereas, because sufficient personal property of the said judgment debtor could not be found, whereof the said sheriff could cause to be made the moneys specified in said writ, the said sheriff did, in obedience to said command, levy on, take and seize all the right, title, interest and claim which the said judgment debtor so had to the lands, tenements, real estate, and premises hereinafter particularly set forth and described, with the appurtenances, and did on the 2nd day of July A. D. 1892, sell all the right, title, interest and claim of the said judgment debtor in and to the said premises, at public auction, in front of the court-house door in the city of Phœnix in said county of Maricopa, between the hours of nine in the
108 morning and five in the afternoon of that day, namely, at 12 o'clock m., after having first given due notice of the time and place of such sale according to law; at which sale all the right, title, interest and claim of said judgment debtor, in and to the said premises, were struck off and sold to the said party of the second part, for the sum of two thousand seven hundred and seventy-five and $\frac{50}{100}$ dollars, in lawful money of the United States of America, the said party of the second part being the highest bidder, and that being the highest sum bid for the same, whereupon the said sheriff, after receiving from the said purchaser the said sum of money so bid as aforesaid, gave to the said party of the second part such certificate of said sale as by law directed to be given, and a duplicate of such certificate was duly filed by the said sheriff in the office of the recorder of the county of Maricopa;

And whereas, six months after said sale have expired without any redemption of the said premises having been made;

Now, this indenture witnesseth: That the said James K. Murphy the sheriff aforesaid, by virtue of the said writ, and in pursuance of the statute in such case made and provided, for and in consideration of the said sum of money, to him in hand paid as aforesaid, by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed and confirmed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all the right, title, interest and claim which the said judgment debtor William A. Hancock had on the said 7th day of March A. D. 1892, or at any time afterwards, or now has in and to all those certain lots pieces or parcels of land situate, lying and being in the said county — Maricopa, and Territory of Arizona, and
109 bounded and particularly described as follows, to wit: Lots numbered fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18) in block (77) in the city of Phœnix.

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

To have and to hold the said premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever, as fully and absolutely as the said sheriff can, may, or ought to, by virtue of the said writ, and of the statute in such case made and provided, grant, bargain, sell, convey and confirm the same.

In witness whereof, the sheriff, the said party of the first part, has hereunto set his hand and seal, the day and year first above written.

J. K. MURPHY, [SEAL.]
Sheriff of the County of Maricopa, Territory of Arizona.

Signed, sealed, and delivered in the presence of—
—— ——.

TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

On this fourth day of January, eighteen hundred and ninety-three, personally appeared before me, Neri Osborn, county recorder in and for Maricopa county, A. T., the within-named James K. Murphy, sheriff of the county of Maricopa, Territory of Arizona, known to me to be the person described in and whose name is subscribed to the within instrument, and he, the said James K. Murphy, acknowledged to me that he, as such sheriff of said county, executed the same for the uses, purposes, and consideration therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the county of Maricopa, Territory of Arizona, the day and year in this certificate first above written.

[RECORDER'S SEAL.] NERI OSBORN,
County Recorder.

Deed. Sheriff, etc., to George H. N. Lurhs. Dated Jan. 4th, 1893. Def'ts' Ex. No. 1. Filed for record, at the request of George H. N. Luhrs, January 4th, A. D. 1893, at 39 min. past 3 o'clock p. m., and recorded in vol. 32 of Deeds, pages 12, 13, & 14, Maricopa county records. Neri Osborn, county recorder.

TERRITORY OF ARIZONA, }
County of Maricopa. }

I, Neir Osborn, county recorder in and for county and Territory aforesaid, do hereby certify that the within instrument was filed for record at 3.39 o'clock p. m. on this 4 day of July, 1893, and duly recorded in Book No. 32 of Deeds, records of Maricopa county, Arizona, at pages 12, 13, & 14.

Witness my hand and official seal the day and year above written.

NEIR OSBORN,
County Recorder,
By WM. E. THOMAS, *Deputy.*

Filed May 10th, 1894.

J. E. WALKER, *Clerk,*
By C. H. KNAPP,
Deputy Clerk.

Filed (in the supreme court of the Territory of Arizona) Jan'y 9th, 1899.

LLOYD JOHNSTON, *Clerk.*

111 (DEFENDANTS' EXHIBIT No. 2.)

This indenture, made this 27th day of February 1886, between Wm. A. Hancock of the city of Phœnix, in the county of Maricopa and Territory of Arizona of the one part and Lillie B. Hancock wife of the said Wm. A. Hancock of the other part;

Witnesseth: That the said Wm. A. Hancock in consideration of the love and affe-tion, which he the said Wm. A. Hancock hath and beareth unto the said Lillie B. Hancock, hath given, granted, aliened, conveyed and confirmed, and by these presents doth give, grant, alien and confirm unto the said Lillie B. Hancock her heirs and assigns all the right, title and interest of the said Wm. A. Hancock of, in and to all those certain lots, pieces or parcels of land situate, lying and being in the city of Phœnix, county of Maricopa and Territory of Arizona described as follows, to wit: Lots numbered fourteen (14), fifteen (15), sixteen (16) seventeen (17) and eighteen (18) in block number seventy-seven (77) as appears by the plat of said city of Phœnix, made by Wm. A. Hancock surveyor, now on file in the office of the county recorder of Maricopa county.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof and all the estate, right, title, interest, claim and demand whatsoever of him, the said Wm. A. Hancock of in and to the premises and every part and parcel thereof with the appurtenances.

To have and to hold all and singular the said premises hereby granted and confirmed or mentioned or intended so to be with their and every of the appurtenances unto the said Lillie B. Hancock, her heirs and assigns, to the only use and behoof, with the rents, issues and profits thereof, of her, the said Lillie B. Hancock, her heirs and assigns forever.

112 In witness whereof, the said Wm. A. Hancock has hereunto set his hand and seal the day and year first above written.

WM. A. HANCOCK. [SEAL.]

TERRITORY OF ARIZONA, }
County of Maricopa, } *ss:*

On this 27th day of February, A. D. one thousand eight hundred and eighty-six, before me, R. E. Sloan, a notary public in and for the said county of Maricopa, Territory of Arizona, personally appeared W. A. Hancock, known to me to be the same person whose name is subscribed to the said annexed instrument, who duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the said county of Maricopa, Territory of Arizona, the day and year in this certificate first above written.

R. E. SLOAN,
Notary Public.

[NOTARY SEAL.]

No. 533. Deed. Wm. A. Hancock to Lillie B. Hancock. Dated Feb'y 27th, 1886. Recorder's office, Phœnix, Maricopa Co., A. T. Filed and recorded, at request of Lillie B. Hancock, March 6th, A. D. 1886, at 11.45 o'clock a. m., Book 12 of Deeds, pages 359 & 360. W. R. Morris, county recorder. Filed Feb'y 25th, 1892. C. H. Knapp, clerk, by J. H. Stout, dep-ty. Filed (in supreme court of the Territory of Arizona) Jan'y 9th, 1899. Lloyd Johnston, clerk.

113 DEF'TS' EX. 3 AND NOTE.

Mortgage.

Know all men by these presents: that we, Wm. A. Hancock and Lilly B. Hancock, mortgagors, of Phœnix, county of Maricopa, Territory of Arizona, for and in consideration of the sum of twenty-six hundred dollars, to them in hand paid by Robert Allstatter of Hamilton, State of Ohio, mortgagee, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said Robert Allstatter all that certain premises described as follows, to wit: Lots fourteen (14) fifteen (15) sixteen (16) seventeen (17) and eighteen (18) in block seventy-seven (77), in the city of Phœnix, in the county of Maricopa and Territory of Arizona, as appears by the plat of said city of Phœnix, made by Wm. A. Hancock surveyor, a copy of which said plat is on file and of record in the office of the county recorder of Maricopa county; together with all and singular the appurtenances thereunto belonging.

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Robert Allstatter, his heirs and assigns forever.

This conveyance is intended as a mortgage to secure the payment of one certain promissory note, given by Wm. A. Hancock and Lilly B. Hancock, of date March 21st, 1892, which said note is in words and figures following, to wit:

$2,600. PHŒNIX, ARIZONA TERRITORY, *March 21st*, 1892.

Two years after date, for value received, we or either of us promise to pay to the order of Robert Allstatter, at the Phœnix national bank, in the city of Phœnix, Arizona Territory, twenty-six hundred
114 dollars with interest, at the rate one per cent. per month from date until paid; interest payable semi-annually.

And this instrument shall be void if said promissory note, principal and interest be well and truly paid when due, according to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said promissory note, or the principal thereon, shall not be punctually paid when the same shall become due, as in said promissory note mentioned, then, and in such case, the principal sum of said note and the interest thereon shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said mortgagee Robert Allstatter heirs, executors, administrators and assigns, for the recovery of the same, either by suit

on said note or on this mortgage and note; and in any suit or other proceedings that may be had for the recovery of the said principal sum and interest thereon, it shall and may be lawful for the said mortgagee his heirs, executors, administrators or assigns, to include in the judgment that may be recovered, attorneys' fees not exceeding five per cent., thereon upon the amount found due the plaintiff on said note and this mortgage, or in case of settlement after suit brought, but before judgment rendered, then two and ½ per cent., on amount found due at the time of settlement, as well as all payments that the said mortgagee his heirs, executors, administrators or assigns may be obliged to make for his security, or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises, legally laid or made thereon.

Witness our hands, this 21st day of March, 1892.

WM. A. HANCOCK. [SEAL.]
LILLY B. HANCOCK. [SEAL.]

Signed, sealed and delivered in the presence of—

——— ———.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

115 Before me, Bruce Perley, a notary public in and for said county of Maricopa, on this day personally appeared Wm. A. Hancock and Lilly B. Hancock known to me to be the persons whose name- are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this twenty-second day of March, A D. 1892.

BRUCE PERLEY,
Notary Public.

[NOTARY SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Before me, Bruce Perley, a notary public in and for said county of Maricopa, on this day personally appeared Lilly B. Hancock, wife of said Wm. A. Hancock, known to me to be the person whose name is subscribed to the foregoing instrument, and, having been examined by me privily and apart from her husband and having the same fully explained to her, she, the said Lilly B. Hancock, acknowledged such instrument to be her act and deed and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this twenty-second day of March, A. D. 1892.

[NOTARY SEAL.]

BRUCE PERLEY,
Notary Public.

Mortgage from Wm. A. Hancock and Lilly B. Hancock to Robert Allstatter. Dated March 21st, 1892. Filed for record at the request of Robert Allstatter at 45 minutes past 11 o'clock a. m. on the 22nd day of M'ch, 1892, in Book 13 of Mortgages, pages 314, 315, of the county of Maricopa, Territory of Arizona. Neri Osborn, county recorder.

TERRITORY OF ARIZONA, }
County of Maricopa. }

116 I, Neri Osborn, county recorder in and for county and Territory aforesaid, do hereby certify that the within instrument was filed for record at 11.45 o'clock a. m. on this 22d day of M'ch, 1892, and duly recorded in Book No. 13 of Mortgages, records of Maricopa county, Arizona, at pages 314, 315.

Witness my hand and official seal the day and year above written.

NERI OSBORN,
County Recorder.

[RECORDER'S SEAL.]

[Phœnix Nat'l Bank, Phœnix, Arizona. No. 5090.]

Filed May 10th, 1894.

J. E. WALKER, *Clerk.*
By C. H. KNAPP, *Deputy.*

Filed (in the supreme court of the Territory of Arizona) Jan'y 9th, 1899.

LLOYD JOHNSTON, *Clerk.*

[Phœnix Nat'l Bank, Phœnix, Arizona. No. 5090.]

DEF'TS' EX. 3½.

$2,600.00. PHŒNIX, ARIZONA TERRITORY, *March 21st*, 1892.

Two years after date, for value received, we or either of us promise to pay to the order of Robert Allstatter, at the Phœnix national bank, in the city of Phœnix, Arizona Territory, twenty-six hundred dollars, with interest, at the rate of one per cent. per month, from date until paid; interest payable semi-annually.

WM. A. HANCOCK.
LILLY B. HANCOCK.

(Endorsed on back.)

Sep. 21, 1892. Six months' interest.....		$156.00
March 21, 1893. For interest.....	80.00	
April 16, 1893. " "	76.00	
		156.00

Filed May 10th, 1894. J. E. Walker, clerk, by C. H. Knapp, deputy clerk. Filed (in the supreme court of the Territory of Arizona) Jan'y 9th, 1899. Lloyd Johnston, clerk.

117 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff, *vs.* WILLIAM A. HANCOCK, LILY B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, Defendants.	No. 1927. Complaint. Filed Apr. 4, 1894, at 2.30 p. m. J. E. Walker, Clerk, by Lewis Jordan, Deputy.

To the honorable district court of said county the plaintiff complains and alleges:

1. That the plaintiff, Robert Alstatter, is a resident citizen of the county of Butler and State of Ohio and *a*tyled plaintiff herein, and the defendants, William A. Hancock, Lilly B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, are resident citizens of the county of Maricopa and Territory of Arizona and styled defendants herein.

2.

That on the 21st day of March, 1892, at Phœnix, Arizona, the defendants William A. Hancock and Lily B. Hancock made, executed, and delivered to said plaintiff their certain promissory note in writing bearing date on that day and in the words and figures as follows, to wit:

$2,600.00. PHŒNIX, ARIZONA TERRITORY, *March 21st*, 1892.

Two years after date, for value received, we or either of us promise to pay to the order of Robert Allstatter, at the Phœnix national bank, in the city of Phœnix, Arizona Territory, twenty-six hundred dollars, with interest, at the rate of one per cent. per month, from date until paid; interest payable semi-annually.

WM. A. HANCOCK.
LILY B. HANCOCK.

118 Said note is indorsed on back as follows:

Sept. 22nd, 1892. Six months' interest		$156.00
March 21st, 1893. For interest	$80.00	
April 16th, 1893. For interest	76.00	
		$156.00

That there is now due and unpaid from said William A. and Lily B. Hancock to said plaintiff on said promissory note the sum of $2,600.00, principal, together with interest thereon, at the rate of one per cent. per month, from the date thereof until paid, less credits of $312.00, interest indorsed on said note aforesaid.

3.

That the said defendants, William A. Hancock and Lily B. Hancock, to secure the payment of said principal sum and the interest thereon as mentioned in said note according to the tenor thereof, did make and execute under their hand and seal and deliver to the said

plaintiff their certain mortgage, in writing, bearing date the 21st day of March, 1892, and did mortgage the following-described property, to wit, lots numbers 14, 15, 16, 17, and 18, in block No. seventy-seven (77), according to the recorded plat of the city of Phœnix, Maricopa county, Arizona, and situated in said city, county, and Territory aforesaid, and conditioned for the payment of said sum of $2,500.00 and interest thereon at the rate of and at the time and in the manner specified in said note and according to the conditions thereof, and further conditioned in said mortgage for the payment of five per cent. on amount found due as attorney's fees to be included in said judgment, and any further sum that the plaintiff may have paid out for his security for charges legally made or laid thereon according to the legal tenor and effect of said mortgage; that the plaintiff, on April 2nd, 1894, paid out for abstract of title and examining said title to said mortgaged premises the sum of $20.00, which is a
119 legal charge against said property by virtue of said mortgage aforesaid, which said mortgage was duly signed and acknowledged by said William A. and Lily B. Hancock and certified so as to entitle it to be recorded, and the same was afterwards, to wit, on the 22nd day of March, 1892, duly recorded in the office of the county recorder of said county of Maricopa, in Book No. 13 of Mortgages, pages 314, 315, a copy of which said mortgage, with endorsements thereon, is hereunto annexed, marked Exhibit "A," and made a part of this complaint.

4.

That the interest on the said principal sum mentioned in said promis-ory note and in the said mortgage has been paid for one year, but nothing more has been paid thereon, and the principal sum mentioned in said note and mortgage, together with the interest thereon at the rate of one per cent. per month, as in the said note specified, less the credits mentioned, aforesaid, are now due and unpaid, and the further sum of seven per cent. interest on the semi-annual payment of interest from the time of the maturity of said payments, according to the tenor and effect of said note and mortgage, has not been paid by said defendants, and is now past due and payable.

5.

That the plaintiff, on the 2nd day of April, 1894, paid out for an abstract of title of said premises the sum of $20.00; which said sum has not been paid by said defendants.

6.

That the plaintiff is now the legal owner and holder of said note and mortgage.

7.

That the defendants George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser have or claim to have some interest or claim upon said premises or some part thereof, as purchaser-, judgment-
120 lien creditors, or otherwise, which interest or claim, if any they have, *are* subsequent to and subject to the lien of the

plaintiff's mortgage, and the plaintiff became the mortgagee of said mortgaged premises in good faith without any notice of any prior lien.

8.

Wherefore the plaintiff prays judgment against said defendants, William A. Hancock and Lily B. Hancock, for the sum of $2,600.00, with interest thereon, at the rate of one per cent. per month, from the 21st day of March, 1893, to date of judgment, and seven per cent. interest on installments of semi-annual payments of interest from the maturity of same to date of judgment, and for the sum of $20.00 expended as charges for abstract of title, and for five per cent. on amount found due as and for attorneys' fees and for costs of suit.

That the usual decree may be made for the sale of said premises by the sheriff of said county according to law and the practice of this court; that the proceeds of said sale may be applied in payment of the amount due to the plaintiff and said attorneys' fees and the costs of suit, and that said defendants and all persons claiming under them subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrance-s, or otherwise, may be barred and foreclosed of all rights and claims in the said premises and every part thereof, and that the said plaintiff may have judgment and execution against the said defendants, William A. and Lily B. Hancock, for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment, and that the plaintiff may have such other and further relief in law and equity as he may be entitled to, and for this plaintiff will ever pray.

J. B. EARLY,
PORTER W. FLEMING,
Attorneys for Plaintiff.

121 *Mortgage.*

Exhibit "A" same as Defendants' Exhibit 3, page 113.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, *Defendant*, *vs.* WILLIAM A. HANCOCK, LILLY B. HANCOCK, GEORGE H. N. LUHRS, THOMAS W. PEMBERTON, and M. WORMSER, Defendants. } No. 1927. Summons. Filed April 5, 1894. J. E. Walker, Clerk, by Lewis Jordan, Deputy Clerk.

Action brought in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and the complaint filed in said Maricopa county, in the office of the clerk of said district court.

In the name of the Territory of Arizona to William A. Hancock, Lilly B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, defendants, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and answer the complaint therein filed with the clerk of this said court, at Phœnix, in said county, within ten days after the service upon you of this summons, if served in this said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and seal of the district court of the third judicial district of the Territory of Arizona in and for Maricopa county this 4 day of April, A. D. 1894.

J. E. WALKER,
Clerk of said District Court,
By LEWIS JORDAN,
Deputy Clerk.

[COURT SEAL.]

122

OFFICE OF THE
SHERIFF OF THE COUNTY OF MARICOPA.

I hereby certify that I received the within summons on the 4th day of April, A. D. 1894, at the hour 3.10 p. m., and personally served the same on the 4th day of April, A. D. 1894, on Lilly B. Hancock, G. H. N. Luhrs, and M. Wormser and on the 5th day of April on Wm. A. Hancock and T. W. Pemberton, being the defendants named in said summons, by delivering to each of them at Phœnix, county of Maricopa, A. T., a copy of said summons, to

which was attached a true copy of the complaint mentioned in said summons.

Dated this 5th day of April, A. D. 1894.

J. K. MURPHY, *Sheriff.*
By W. WIDMER,
Deputy Sheriff.

Fees.

Service, 5	$7.50
Copies, 5	3.00
Travel, 1 miles	.30
Total	$10.80

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff, *vs.* WILLIAM A. HANCOCK, LILLY B. Hancock, George H. N. Luhrs, Thomas Pemberton, and M. Wormser, Defendants.	No. 1927. Answer. Received Copy of the within Answer April 14th, 1894. Porter W. Fleming, Att'y for Plaintiff. Filed April 14th, 1894. J. E. Walker, Clerk.

Comes now the above-named defendant, George H. N. Luhrs, by Thomas Armstrong, Jr., his attorney, and for his answer to the plaintiff's complaint herein shows to the court and alleges:

That long prior to the date of plaintiff's mortgage, as
123 alleged in the complaint, and prior to the recording thereof this defendant, with his coöartner, Newell Herrick, had and obtained against said defendant, William A. Hancock, a judgment for the sum of $2,524.00 in the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa. The said judgment was duly docketed and recorded in the office of the clerk of the said district court on the 7th day of March, A. D. 1892, as ordered by said court, and which judgment was from the date thereof, to wit, the 7th day of March, 1892, a lien upon the property mentioned and described in the plaintiff's complaint and prior to the date of the plaintiff's mortgage, all of which said plaintiff well knew at the time of the execution of his mortgage described in his complaint herein.

And the defendant further shows that he afterwards purchased the interest of his said copartner in said judgment and caused execution to be duly issued upon said judgment and the property described in the plaintiff's complaint levied upon and sold by the sheriff of said county under said judgment, and said property was and the whole thereof was on the 2nd day of July, 1892, sold by said sheriff to this plaintiff upon and under said execution and judgment.

That neither said defeedants William A. Hancock, Lilly B. Hancock, nor any other person has ever redeemed said property from

said sale, and this plaintiff did, on the 4th day of January, 1893, take and obtain from said sheriff upon and on account of said sale and on account of the failure of the defendants or any other person to redeem said property a deed thereof and of the whole thereof, subject only to the judgment of the defendant T. W. Pemberton against said property.

And the defendant further shows that he did afterward and on the 4th day of February, 1893, for his further security and in confirmation of the aforesaid deed, take and receive another deed
124 of said property made upon said sale, as aforesaid, made and executed by J. B. Montgomery, formerly sheriff of Maricopa county, and who, as said sheriff, had made said sale of said property under said judgment, but whose term of office had expired before the time or the redemption of said property under said sale had expired, both of which said deeds were duly recorded in the office of the county recorder of said Maricopa county, the first of said deeds on the 4th day of January, 1893, in Book Number 32 of Deeds, on pages 12, 13, 14, and the second of said deeds on the 4th day of February, 1893, in Book Number 33 of Deeds, pages 53 to 55, inclusive.

And this defendant further shows that he is the owner of said property described in the complaint herein and of the whole thereof under and by virtue of said sale and said deeds, subject only to the claim of the defendant Thomas W. Pemberton, judgment creditor.

Wherefore the defendant prays that in any sale that may be declared by the court in this cause the proceeds thereof may be brought into court and distributed among the parties hereto in accordance with their equities and priorities in said property, and that after payment of the judgment lien of said defendant, Thomas W. Pemberton, that the title of said property be established in this defendant free and clear of all prior claims whatsoever and free and clear of any liens of the plaintiff herein by reason of his said mortgage or otherwise.

Dated this 14th day of April, 1894.

THOS. ARMSTRONG, JR.,
Attorney for the Defendant George H. N. Luhrs.

125 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff, *vs.* WILLIAM A. HANCOCK, LILY B. HANCOCK, GEORGE H. N. LUHRS, THOMAS W. PEMBERTON, and M. WORMSER, Defendants.	First Amended Complaint. No. 1927. Filed May 5, 1894. J. E. Walker, Clerk, by Lewis Jordan, Deputy.

Now comes the plaintiff in the above-entitled cause and amends his original complaint filed in this cause on the 4th day of April, 1894, and serves each defendant with a copy of same, and for amended complaint states as follows:

To the honorable district court of said county the plaintiff complains and alleges:

1. That the plaintiff, Robert Allstatter, is a resident citizen of the county of Butler and State of Ohio and styled plaintiff herein, and the defendants, William A. Hancock, Lily B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, are resident citizens of the county of Maricopa and Territory of Arizona and styled defendants herein.

2. That on the 21st day of March, 1892, at Phœnix, Arizona, the defendants William A. Hancock and Lilly B. Hancock made, executed, and delivered to said plaintiff their certain promissory note in writing, bearing date on that day, in words and figures as follows, to wit:

$2,600.00. PHŒNIX, ARIZONA TERRITORY, *March* 21*st*, 1892.

Two years after date, for value received, we or either of us promise to pay to the order of Robert Allstatter, at the Phœnix national bank, in the city of Phœnix, Arizona Territory, twenty-six hundred dollars, with interest, at the rate of one per cent. per month, from date until paid, interest payable semi-annually.

126

WILLIAM A. HANCOCK.
LILLY B. HANCOCK.

Said note is endorsed on back as follows:

Sept. 22nd, 1892. Six months' interest		$156.00
March 21st, 1893. For interest	$80.00	
April 15th, 1893. For interest	76.00	
		$156.00

That there is now due and unpaid from said William A. Hancock and Lilly B. Hancock to said plaintiff on said promissory note the sum of $2,600.00, principal, together with interest thereon, at the rate of one per cent. per month, from the date thereof until paid, less credits of $312.00, interest, indorsed on said note aforesaid.

3. That the said defendants, William A. and Lilly B. Hancock, to secure the payment of said principal sum and the interest thereon, as mentioned in said note, according to the tenor thereof, did make and execute, under their hand and seal, and deliver to the said plaintiff their certain mortgage in writing bearing date the 21st day of March, 1892, and did mortgage the following-described property, to wit, lots numbered 14, 15, 16, 17, and 18, in block seventy-seven, according to the recorded plat of the city of Phœnix, Maricopa county, Arizona, and situate in said city and county and Territory aforesaid, and conditioned for the payment of said sum of $2,600.00 and interest thereon at the rate of and at the time and in the manner specified in said note and according to the conditions thereof, and further conditioned in said mortgage for the payment of five per cent. on amount found due as and for attorneys' fees, to be included in said judgment, and any further sum that the plaintiff

may have paid out for his security for charges legally laid or
127 made thereon, according to the legal tenor and effect of said mortgage.

That the plaintiff, on April 2nd, 1894, paid out for abstract of title and examining said title to said mortgaged premises the sum of $20.00, which is a legal *g*harge against said property by virtue of said mortgage aforesaid; which said mortgage was duly signed and acknowledged by said William A. Hancock and Lilly B. Hancock and certified, so as to entitle it to be recorded, and the same was afterward, to wit, on the 22nd day of March, 1892, duly recorded in the office of the county recorder of said county of Maricopa, in Book No. 13 of Mortgages, pages 314, 315, a copy of which said mortgage, with endorsements thereon, is hereto annexed, marked Exhibit "A," and made part of this complaint.

4. That the interest on said principal sum mentioned in said promissory note and in said mortgage has been paid for one year, but nothing more has been paid thereon, and the principal sum mentioned in said note and mortgage, together with the interest thereon at the rate of one per cent. per month, as in said note specified, less the credits mentioned aforesaid, are now due and unpaid, and the further sum of seven per cent. interest on the semi-annual payments of interest from the time of maturity of said payments, according to the tenor and effect of said note and mortgage, has not been paid by said defendant-, William A. Hancock and Lilly B. Hancock, and is now due and payable.

5. That the plaintiff, on the second day of April, 1894, paid for an abstract of title of said premises the sum of $20.00; which said sum ha*d* not been paid by said defendants, William A. and Lilly B. Hancock.

6. That the plaintiff herein, on the fifth day of May, 1894, paid out the sum of $163.20 for the redemption of a tax-title certificate given by the tax collector of Maricopa county to M. Wormser
128 on a part of the property in this suit and dated May tenth, 1893, and now held by said M. Wormser as a claim against said property, and said M. Wormser would receive a deed from said tax collector to property on May 10th, 1894, if not redeemed by this plaintiff, which deed, if made, would cast an additional cloud on the property in controversy; that said defendants, William A. and Lilly B. Hancock, failed and refused to redeem said property, and this plaintiff was compelled to redeem the same to protect his said mortgage and the money due thereon from said William A. and Lilly B. Hancock; that defendants William A. and Lilly B. Hancock have not paid the said sum of $163.20, and it is now due and unpaid.

7. That the plaintiff is now the legal owner and holder of said note and mortgage.

8. That the defendant- George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser have or claim to have some interest or claim upon said premises or some part thereof as purchasers, judgment-lien creditors, or otherwise, which interest or claim, if any they have, *are* subsequent to and subject to the lien of the plaintiff's mortgage,

and the plaintiff became the mortgagee of said mortgaged premises in good faith without any notice of any prior lien.

9. Wherefore the plaintiff prays judgment against said defendants, William A. Hancock and Lilly B. Hancock, for the sum of $2,600.00, with interest thereon, at the rate of one per cent. per month, from the 21st day of March, 1893, to the date of the judgment, and seven per cent. interest in installments of semi-annual payments of interest from the maturity of same to date of judgment, and for the sum of $20.00 expended as charges for abstract of title and for five per cent. on amount found due as and for attorneys' fees and for the further sum of $163.20, with interest on same, for money paid out for
129 redemption of property to tax collector and to the defendant M. Wormser and for costs of suit.

That the usual decree may be made for the sale of said premises by the sheriff of said county according to law and the practice of this court; that the proceeds of said sale may be applied in payment of the amount due to the plaintiff and said attorneys' fees and the costs of suit, and that said defendants and all persons claiming under them subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrance, or otherwise, may be barred and foreclosed of all rights and claims in the said premises and every part thereof, and that the said plaintiff may have judgment and execution against the said defendants, William A. and Lilly B. Hancock, for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment.

And that the plaintiff may have such other and further relief in law and equity as he may be entitled to; and for this the plaintiff will ever pray.

J. B. EARLY,
P. W. FLEMING,
Attorneys for Plaintiff.

Mortgage. Exhibit "A," same as Defendants' Exhibit 3, page 113.

130 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff, *vs.* WILLIAM A. HANCOCK, LILLY B. HANCOCK, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, Defendants.	No. 1927. Reply to Defendants' Answer. Filed May 5th, 1894. J. E. Walker, Clerk.

Now comes the plaintiff in the above cause and demurs to the answer of the defendant Thomas W. Pemberton and for cause of demurrer states that said answer does not state facts sufficient to constitute a defense to plaintiff's cause of action; and of this plaintiff prays judgment of the court, &c.

And further replying herein, should said demurrer be overruled plaintiff states that he denies all and singular the allegations contained in said defendant's answer, and calls for strict proof of the same.

And further replying herein to said defendant Thomas W. Pemberton's answer, this plaintiff states that long prior to the date of the said judgment held by the defendant Thomas W. Pemberton against the said defendant, William A. Hancock, the property described in said plaintiff's complaint was the separate property of the defendant Lilly B. Hancock, wife of said defendant, William A. Hancock, and the legal and equitable title to the same was in her, the said Lilly B. Hancock, defendant herein, long prior to the pretended lien and claim of said defendant, Thomas W. Pemberton; and of this plaintiff is ready to verify and prove.

J. B. EARLY AND
P. W. FLEMING,
Attorneys for Plaintiff.

131 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff,
vs.
WILLIAM A. HANCOCK, LILLY B. HANCOCK, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, Defendants.

No. 1927. Answer. Filed April 9th, 1894. J. E. Walker, Clerk.

Now comes the above-named defendant, Thomas W. Pemberton, by C. F. Ainsworth, his attorney, and for answer to the complaint of the plaintiff herein alleges:

That long prior to the time the mortgage described in plaintiff's complaint was executed, as therein set forth, to wit, on September 4th, A. D. 1891, this defendant obtained a judgment in this court against the said defendant, William A. Hancock, for the sum of three thousand eight hundred and seventy-one and 75/100 ($3,871.75) dollars, for principal, interest, and costs.

That said judgment was duly docketed in the judgment docket of this court on September 4th, A. D. 1891, for said amount; that said judgment bore interest, at the rate of one and one-half per cent. per month, from date until paid.

That on February 8th, A. D. 1893, the amount of said judgment was reduced by credits to the sum of two thousand five hundred and twelve and 25/100 ($2,512.25) dollars; that thereafter, to wit,
132 on March 20th, A. D. 1893, there was paid on said judgment and duly credited on said docket the sum of five hundred ($500.00) dollars; that there is now due on said judgment the sum of two thousand and sixty-two and $\frac{49}{100}$ ($2,062.49) dollars, with interest thereon, at the rate of one and one-half per cent. per month, since the 20th day of March, A. D. 1893, and that the same is a prior lien on the property described in plaintiff's complaint herein

to the mortgage therein set forth, and that this plaintiff had due notice of said judgment lien at the time said mortgage was executed to him.

Wherefore this defendant prays the judgment of this court that his judgment lien as herein set forth shall be adjudged and declared the first lien on the property described in plaintiff's complaint, and that in case plaintiff's said mortgage is adjudged to be foreclosed and the property herein described sold that out of the proceeds of said sale that this defendant be first paid the amount of his said judgment lien, and that this defendant have and recover his costs and disbursements herein, and for such further and other relief as may be just and equitable in the premises.

C. F. AINSWORTH,
Attorney for Defendant Thos. W. Pemberton.

133 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff,
vs.
WILLIAM A. HANCOCK, LILLY B. HANCOCK, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, Defendants.

No. 1927. Reply to Defendants' Answer. Filed May 5th, 1894. J. E. Walker, Clerk.

Now comes the plaintiff in the above cause and demurs to the answer of the defendant G. H. N. Luhrs, and for cause of demurrer states that said answer does not state facts sufficient to constitute a defense to plaintiff's cause of action; and of this plaintiff prays judgment of the court, &c.

And further replying herein, should said demurrer be overruled, plaintiff states that he denies all and singular the allegations contained in said defendant's answer, and calls for strict proof of the same.

J. B. EARLY AND
P. W. FLEMING,
Attorneys for Plaintiff.

And further replying herein to said defendant G. H. N. Luhrs' answer, this plaintiff states that long prior to the date of the said judgment held by defendant G. H. N. Luhrs against the said defendant, William A. Hancock, the property described in said plaintiff's complaint was the separate property of the defendant Lilly B. Hancock, wife of said defendant, William A. Hancock, and the legal and equitable title to the same was in her, the said Lilly B. Hancock, defendant herein, long prior to the pretended lien and claim of said defendant, G. H. N. Luhrs; and *of* this plaintiff is ready to verify and prove.

J. B. EARLY AND
P. W. FLEMING,
Attorneys for Plaintiff.

134 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff, *vs.* WILLIAM A. HANCOCK, LILLY B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, Defendants.	Amended Reply to Def'ts' Answer. Filed May 9th, 1894. J. E. Walker, Clerk, by C. H. Knapp, Deputy Clerk.

Now comes the plaintiff in the above cause and demurs to the answer of the defendant Thomas W. Pemberton, and for cause of demurrer states that said answer does not state facts sufficient to constitute a defense to plaintiff's cause of action, and of this plaintiff prays judgment of the court.

And, further replying herein, should said demurrer be overruled, plaintiff states that he denies all and singular the allegations contained in said defendants' answer and calls for strict proof of the same.

And, further replying herein to said defendant Thomas W. Pemberton's answer, this plaintiff states that long prior to the date of the said judgment held by defendant Thomas W. Pemberton against the said defendant, William A. Hancock, the property described in said plaintiff's complaint was the separate property of the defendant Lilly B. Hancock, wife of said defendant, William A. Hancock, and the legal and equitable title to the same was in her, the said Lilly B. Hancock, defendant herein, and is and was the homestead of herself and husband, the defendant herein, long prior to the pretended lien and claim of said defendant, Thomas W. Pemberton, and of this plaintiff is ready to verify and prove.

J. B. EARLY AND
P. W. FLEMING,
Att'ys for Pl'ffs.

135 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff, *vs.* WILLIAM A. HANCOCK, LILLY B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, Defendants.	Amended Reply to Defendants' Answer. Filed May 9th, 1894. J. E. Walker, Clerk, by C. H. Knapp, Deputy Clerk.

Now comes the plaintiff in the above cause and demurs to the answer of the defendant G. H. N. Luhrs, and for cause of demurrer states that said answer does not state facts sufficient to constitute a defense to plaintiff's cause of action, and of this plaintiff prays judgment of the court.

And, further replying herein, should said demurrer be overruled, plaintiff states that he denies all and singular the allegations con-

tained in said defendants' anwer and calls for strict proof of the same.

And, further replying herein to said defendant G. H. N. Luhrs' answer, this plaintiff states that long prior to the date of the said judgment held by defendant George H. N. Luhrs against the said defendant, William A. Hancock, the property described in said plaintiff's complaint was the separate property of the defendant Lilly B. Hancock, wife of said defendant, William A. Hancock, and the legal and equitable — to the same was in her, the said Lilly B. Hancock, defendant herein, and is and was the homestead of herself and husband, the defendants herein, long prior to the pretended lien and claim of said defendant, G. H. N. Luhrs, and of this plaintiff is ready to verify and prove.

J. B. EARLY,
P. W. FLEMING,
Att'ys for Pl'ffs.

136 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff, *vs.* WILLIAM A. HANCOCK, LILLY B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, Defendants.	No. 1927. Answer to Amended Complaint. Filed May 7th, 1894. J. E. Walker, Clerk, by C. H. Knapp, Deputy Clerk. Service of the Within Answer by Copy is Hereby Admitted this 7 Day of May, 1894. J. B. Early. P. W. Fleming. Attorney for Pl'ff.

Answer to Amended Complaint.

Now comes the above-named defendant, Thomas W. Pemberton, by C. F. Ainsworth, his attorney, and for answer to the amended complaint of the plaintiff herein alleges:

That long prior to the time the mortgage described in plaintiff's complaint was executed, as therein set forth, to wit, on September 4th, A. D. 1891, this defendant obtained a judgment in this court against the said defendant, William A. Hancock, for the sum of three thousand eight hundred and seventy-one and $\frac{75}{100}$ ($3,871.75) dollars for principal, interest, and costs; that execution was issued on said judgment on or about October 1st, 1891.

That said judgment was duly docketed in the judgment docket of this court on September 4th, 1891, for said amount; that said judgment bore interest, at the rate of one and one-half per cent. per month, from date until paid.

That at the date said judgment was rendered against the said William A. Hancock and in favor of Thomas W. Pemberton the property described in plaintiff's complaint was, ever since has been, and is now community property and subject to the payment of the

debts of said defendant, William A. Hancock; that said judg-
137 ment was at the date of its rendition, as aforesaid, ever since has been, and now is a lien upon the property described in plaintiff's complaint herein.

That on February 8th, A. D. 1893, the amount of said judgment was reduced by credits to the sum of two thousand five hundred and twelve and $\frac{25}{100}$ ($2,512.25) dollars; that thereafter, to wit, on March 20th, A. D. 1893, there was paid on said judgment and duly credited on said docket the sum of five hundred ($500.00) dollars; that there is now due on said judgment the sum of two thousand and sixty-two and $\frac{49}{100}$ ($2,062.49) dollars, with interest thereon, at the rate of one and one-half per cent. per month, since the 20th day of March, A. D. 1893, and that the same is a prior lien on the property described in plaintiff's complaint herein to the mortgage therein set forth, and that this plaintiff had due notice of said judgment lien at the time said mortgage was executed to him.

Wherefore this defendant prays the judgment of this court that this judgment lien as herein set forth shall be adjudged and declared the first lien on the property described in plaintiff's complaint, and in case plaintiff's said mortgage is adjudged to be foreclosed and the property herein described sold that out of the proceeds of said sale that this defendant be first paid the amount of his said judgment lien, and that this defendant have and recover his costs and disbursements herein, and for such further and other relief as may be just and equitable in the premises.

C. F. AINSWORTH.
Attorney for Defendant Thomas W. Pemberton.

138 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff, *vs.* WILLIAM A. HANCOCK, LILLY B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, Defendants.	Judgment and Decree of Foreclosure. Filed May 10th, 1894, at 4 o'clock p. m. J. E. Walker, Clerk, by C. H. Knapp, Deputy Clerk.

Now, on this the 10th day of May, 1894, come on to be heard the above cause for trial, and both plaintiff and defendants appeared by their respective attorneys and announced ready for trial, and on motion of plaintiff suit was dismissed as to the defendants George H. N. Luhrs and Thomas W. Pemberton, and a jury being waived, the matter in controversy, as well *as* of fact as of law, was submitted to the court, and the court, having heard the proof in said cause and being fully advised as to the law, declared the law to be with the plaintiff; and it appearing to the court from the proof submitted that there is now due to the plaintiff, Robert Allstatter, from the said defendants, William A. Hancock and Lilly B. Hancock, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of three thousand one hundred and seven

dollars and fifty cents ($3,107.50), which sum is to draw and to bear interest from the date hereof at the rate of one per cent. per month until paid, and the further sum of one hundred and forty-eight and ten one-hundredths dollars ($148.10) as attorneys' fees, said latter sum to bear interest at the rate of seven per cent. per annum from the date hereof until paid, and that the allegations in the said plaintiff's complaint contained are true;

139 And it further appearing to the court that said indebtedness mentioned was secured by a mortgage, duly and legally executed, by the said William A. Hancock and Lilly B. Hancock, defendants herein, on the 21st day of March, 1892, and properly recorded in the office of the county recorder of said Maricopa county on the 22nd day of March, 1892, in Book Number 13 of Mortgages, pages 314, 315, and that said mortgage was a lien upon the following-described property, to wit: All that certain premises known as lots numbered 14, 15, 16, 17, and 18, in block numbered seventy-seven, and situated in the city of Phœnix, in the county of Maricopa and Territory of Arizona, as appears by the plat of said city of Phœnix made by William A. Hancock, surveyor, a copy of which said plat is on file and of record in the office of the county recorder of said Maricopa county, together with all appurtenances thereto in anywise belonging, to which said description in said mortgage reference is hereby made to same, it is therefore ordered, adjudged, and decreed by the court that the plaintiff herein, Robert Allstatter, do have and recover of and from the defendants William A. Hancock and Lilly B. Hancock said sum of $3,107.50, principal and interest, with interest thereon from this date, at the rate of one per cent. per month, until paid, and the further sum of $148.10 as and for attorneys' fees, with interest thereon, at the rate of seven per cent. per annum, from the date hereof until paid, together with plaintiff's costs and disbursements, taxed herein at the sum of $30.15.

And it is further ordered, adjudged, and decreed by the court that the mortgage lien as is existed on the twenty-first day of March, 1892, upon the above-described lots and parcels of land described herein be, and the same is hereby foreclosed, and that the clerk of this court do issue an order of sale directed to the sheriff of said Maricopa county, commanding him, the said sheriff, to seize and sell the

140 above-described land and premises as under execution, and that he apply the proceeds thereof to the payment and satisfaction of the said sum of $3,107.50, together with all interest that may — due thereon, and the further sum of $148.10, attorneys' fees, with the interest that may be due thereon and the costs of this suit, and if the said land and premises shall sell for more than sufficient to pay off and satisfy said sums of money, then the said sheriff is hereby directed to pay over the excess to the defendants William A. Hancock and Lilly B. Hancock; but if the said land and premises shall not sell for enough to pay off and satisfy this judgment, then the clerk of this court is directed to issue execution against the property of said William A. Hancock and Lilly B. Hancock for the balance remaining unpaid.

And it is further ordered, adjudged, and decreed by the court that

the defendants and all persons claiming or to claim from or under them or each of them, and all persons having liens subsequent to said mortgage, by judgment, decree, or otherwise, upon the land described herein or their personal representatives, and all persons claiming under them, be forever barred and foreclosed of and from all equity of redemption and claim on, of, and to said mortgaged premises and every part and parcel thereof from and after the delivery of the sheriff's deed to the property described herein.

And it is further adjudged and decreed by the court that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises or any part thereof and any person who since the commencement of this action has come into possession under them or either of them deliver possession thereof to such purchaser or purchasers on production of the sheriff's deed for such premises or any part thereof, and that the purchaser or purchasers mentioned aforesaid do have the proper writs of
141 possession, which the clerk of this court is hereby commanded to issue on the application of said mentioned purchaser or purchasers aforesaid.

Judgment and decree rendered by the court this the tenth day of May, 1894.

By the court:

A. C. BAKER.

In the District Court, Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff.	No. 1927. Judgment-roll Certificate. Filed May 10, 1894.
vs.	
W. A. HANCOCK ET AL., Defendants.	J. E. Walker, Clerk, by Lewis Jordan, Deputy Clerk.

I, the undersigned, clerk of the district court of the third judicial district of Arizona Territory in and for Maricopa county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book D of said court, at page 295.

And I further certify that the foregoing papers, hereto annexed, constitute the judgment-roll in said action.

Witness my hand and seal of the district court this 10 day of May, A. D. 1894.

[COURT SEAL.]

J. E. WALKER, *Clerk*,
By LEWIS JORDAN,
Dep'y Clerk.

142 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff, *vs.* WILLIAM A. HANCOCK, LILLY B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, Defendants.	No. 1927. Answer of W. A. Hancock, Lilly B. Hancock, and M. Wormser. Filed April 13, 1894. J. E. Walker, Clerk, By Lewis Jordan, Deputy.

Now come William A. Hancock, Lilly B. Hancock, and M. Wormser, three of the above-named defendants, by P. S. Perley, their attorney, and deny all and singular the allegations in the said complaint contained save the allegation as to residence of the parties and save the allegation as to the execution of the note and mortgage and the payments alleged thereon.

And they further say that the twenty-dollar alleged claim and charge for abstract and examining title of April 2d, 1894, is an improper and unwarranted charge.

By P. S. PERLEY,
Their Attorney.

And the said M. Wormser, individually answering, says that at the tax sale of delinquent lands for the delinquent taxes of 1892, had and held at this court-house on May 10, 1893, he became the purchaser of one of said lots, to wit, lot 17, for the taxes then delinquent on all of said lots, and holds a duly executed certificate of purchase therefor, which entitles him to a deed of said lot if unredeemed. This is all his interest in said premises, and, though subsequent, is not subject to said mortgage lien.

By P. S. PERLEY,
His Attorney.

143 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff, *vs.* WILLIAM A. HANCOCK, LILLY B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, Defendants.	No. 1927. Order of Sale. Defts' Exhibit No. 5. Filed Aug. 13, 1894. J. E. Walker, Clerk, by Lewis Jordan, Deputy. Filed (in the Supreme Court of the Territory of Arizona) Jan'y 9th, 1899. Lloyd Johnston, Clerk.

In the name of the Territory of Arizona to the sheriff of Maricopa county, Greeting:

Whereas, on the 10th day of May, A. D. 1894, Robert Allstatter recovered a judgment in the district court of Maricopa county, Arizona, against William A. Hancock and Lilly B. Hancock for the sum of three thousand one hundred seven $\frac{5}{100}$ dollars (3,107.50), with interest thereon from the date thereof at the rate of one per cent. per month, and the further sum of one hundred forty-eight

$\frac{10}{100}$ dollars (148.10), attorneys' fees, with interest thereon, at the rate of seven per cent. per annum, from the date thereof until paid, together with plaintiff's costs and disbursements, taxed at the sum of $30.15, as of record is manifest, and also a foreclosure of a mortgage lien as if existed on the 21st day of March, 1892, against the following-described property, to wit, all that certain premises known as lots numbered 14, 15, 16, 17, and 18, in block numbered seventy-seven, and situated in the city of Phœnix, in the county of Maricopa and Territory of Arizona, as appears by the plat of said city of Phœnix made by William A. Hancock, surveyor, a copy of which said plat is on file and of record in the office of the county recorder of said Maricopa county, therefore you,

said sheriff, are hereby commanded that you seize and
144 sell according to law the above-described property as
under execution and all interest of said William A. Hancock and Lilly B. Hancock as it existed on the 10th day of May, 1894, in and to said above-described property, and that you apply the proceeds thereof to the payment and satisfaction of the aforesaid sum of $3,107.50, with interest thereon from the 10th day of May, 1894, at the rate of one per cent. per month, and the further sum of $148.10, attorneys' fees, with interest thereon, at the rate of seven per cent. per annum, from the 10th day of May, 1894, together with plaintiff's costs and disbursements, taxed at the sum of $30.15, together with the further costs of executing this writ, and if the property levied on, as aforesaid, shall not sell for sufficient to pay off and satisfy said judgment and costs, then you are hereby commanded that of the goods and chattels, lands and tenements of the said William A. Hancock and Lilly B. Hancock you cause to be made the balance remaining unpaid; but if said property should sell for more than sufficient to pay off and satisfy said judgment and costs, then you are hereby directed to pay over the excess to said William A. Hancock and Lilly B. Hancock.

Herein fail not, and have you said moneys, together with this writ, before this court within ninety days from this date, showing how you have executed the same.

Given under my hand and seal this 13th day of July, A. D. 1894.

[COURT SEAL.] J. E. WALKER, *Clerk.*

OFFICE OF THE SHERIFF OF MARICOPA COUNTY.

By virtue of the within order of sale, I have this day levied upon all the right, title, claim, and interest of the therein-*named* defendants, William A. Hancock and Lilly B. Hancock, in and to the therein-described real estate.

Dated July 14, 1894.

J. K. MURPHY, *Sheriff,*
By FRANK M. KING,
Deputy Sheriff.

145 OFFICE OF THE SHERIFF OF MARICOPA COUNTY.

I hereby certify that I received the within order of sale on the 13th day of July, 1894, at the hour of 4 o'clock p. m., and by virtue

and in pursuance of the same I did on the 14th day of July, 1894, levy upon all the right, title, claim, and interest of the therein-named defendants in and to the following-described real property, to wit, lots number 14, 15, 16, 17, and 18, in block number seventy-seven (77), and situated in the city of Phœnix, in the county of Maricopa and Territory of Arizona, as appears by the plat of said city of Phœnix made by William A. Hancock, surveyor, a copy of which said plat is on file and of record in the office of the county recorder of said Maricopa county.

And that I advertised the same to be sold by me at the court-house door in the city of Phœnix, Maricopa county, Arizona Territory, at the hour of 2 o'clock p. m., on Saturday, the 11th day of August, 1894, according to law, by causing notice of sale to be published in the Phœnix Gazette, a newspaper printed and published in said county, for three weeks successively immediately preceding said sale and by posting notice of such sale in three of the most public places in said county, one of which was at the court-house door, for the same period, and that on the 11th day of August, 1894, the day on which said real estate was so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale, and sold the said real estate at public auction to Thomas W. Pemberton for the sum of three thousand five hundred and eleven dollars and eighty cents ($3,511.80), in United States lawful money, which was the whole price bid and which I acknowledged to have received, and that I delivered to the said purchaser a certificate of said sale and filed a duplicate thereof in the office of the county recorder of the
146 said Maricopa county, Arizona Territory.

And I further certify that I deducted from the said sum of $3,511.80 my fees, commissions, and expenses and excess of judgment, amounting to the sum of $140.00, leaving a net balance of $3,371.80, which net balance I have paid over to plaintiff's attorney, whose receipt therefor is hereto attached.

And I further certify that I herewith return this writ fully satisfied in the sum of $3,511.80, and that the property sold for ten cents more than the amount of judgment, which excess I have paid to the defendant.

Dated August 11, 1894.

J. K. MURPHY, *Sheriff.*
By FRANK M. KING,
Deputy Sheriff.

($3,371.80.) PHŒNIX, A. T., *August* 13, 1894.

Received from J. K. Murphy, sheriff of Maricopa county, Arizona, the sum of $3,371.80, amount of sale in the case of Robert Allstatter *vs.* William A. Hancock, Lilly B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, after deducting sheriff's fees, commissions, expenses, and excess of judgment.

J. B. EARLY,
Att'y for Pl'ff.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

ROBERT ALLSTATTER, Plaintiff, *vs.* WILLIAM A. HANCOCK, LILLY B. HANCOCK, GEORGE H. N. LUHRS, THOMAS W. PEMBERTON, and M. WORMSER, Defendants.	No. 1927. Def'ts' Ex. No. 5½. Sheriff's Certificate of Sale on Foreclosure. Dated August 11, 1894. Filed (in the Supreme Court of the Territory of Arizona) Jan'y 9th, 1899. Lloyd Johnston, Clerk.

I, J. K. Murphy, as sheriff of the county of Maricopa, Territory of Arizona, do hereby certify that under and by virtue of an order of sale issued out of the district court of the third judicial district of
147 the Territory of Arizona in and for the county of Maricopa, in the action of Robert Allstatter, plaintiff, against William A. Hancock, Lilly B. Hancock, George H. N. Luhrs, Thomas W. Pemberton, and M. Wormser, defendants, rendered on the 10th day of May, 1894, and entered on the 10th day of May, 1894, duly attested the 13th day of July, 1894, and to me as such sheriff duly directed and delivered, whereby I was commanded to sell the property hereinafter described, according to law, and to apply the proceeds of such sale towards the satisfaction of the judgment in said action, amounting to the sum of three thousand one hundred and seven $\frac{50}{100}$ ($3,107.50) dollars, U. S. lawful money, with interests, attorneys' fees, and costs of suit, I duly levied on and on the 11th day of August, 1894, at 2 o'clock p. m., at the court-house door, in the city of Phœnix, in said county of Maricopa, I duly sold at public auction, according to law, and after due and legal notice, to Thomas W. Pemberton, who made the highest and best bid therefor at such sale, for the sum of three thousand five hundred & eleven & $\frac{80}{100}$ dollars, United States lawful money, which was the whole sum paid by him, the real estate in said order of sale, lying and being in said county of Maricopa, Territory of Arizona, and described as follows, to wit, lots number 14, 15, 16, 17, and 18, in block number seventy-seven (77), and situated in the city of Phœnix, in the county of Maricopa and Territory of Arizona, as appears by the plat of said city of Phœnix, made by William A. Hancock, surveyor, a copy of which said plat is on file and recorded in the office of the county recorder of said Maricopa county; and I do hereby further certify that the said property was sold in one lot and parcel, and that the said sum of three thousand five hundred & eleven & $\frac{80}{100}$ dollars was the highest bid made and the whole price paid therefor, and that the same is subject to redemption in six months, pursuant to the statute in such case made and provided.

Given under my hand this 11th day of August, 1894.

J. K. MURPHY, *Sheriff*,
By FRANK M. KING,
Deputy Sheriff.

148 In the Supreme Court of the Territory of Arizona.

GEORGE H. N. LUHRS, Appellant,
vs.
WM. A. HANCOCK ET AL., Appellees.
} No. 669. Minute Entry, January 10th, 1899.

It is ordered that the hearing of this cause be set for January 27th, 1899.

GEORGE H. N. LUHRS, Appellant,
vs.
WM. A. HANCOCK ET AL., Appellees.
} No. 669. Minute Entry, January 30th, 1899.

This cause, coming on for hearing, was ordered submitted on briefs.

GEORGE H. N. LUHRS, Appellant,
vs.
WM. A. HANCOCK, LILLY B. HANCOCK, and Thomas W. Pemberton, Appellees.
} No. 669. Order Affirming Judgment, June 2nd, 1899.

This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the district court be, and the same is hereby, affirmed.

149 In the Supreme Court of the Territory of Arizona.

GEORGE H. N. LUHRS, Appellant,
vs.
WM. A. HANCOCK ET AL., Appellees.
} No. 669. Opinion. Filed June 2nd, 1899. Lloyd Johnston, Clerk.

Appeal from the district court, Maricopa county, Richard E. Sloan, judge.

Hamilton & Armstrong, for appellant.
C. F. Ainsworth, for appellees.

Opinion by DAVIS, *J.*:

This was an action by the appellant to recover the possession of five certain lots in the city of Phœnix, and for the value of the rents and profits thereof. The complaint is in the usual form in ejectment cases. The defendants Wm. A. Hancock and Lilly B. Hancock, husband and wife, answered, pleading not guilty and setting up the statute of limitations in bar of plaintiff's right to recovery. Similar defenses were interposed by the defendant Thomas W. Pemberton, who, by way of cross-complaint, also pleaded his ownership and possession of said premises and asked for affirmative relief as against the adverse claims of the plaintiff. Upon the trial in the court below, the plaintiff was adjudged to have no right, title, or interest in said property, and the defendant Pemberton was adjudged

to be the owner and entitled to the possession thereof. From this judgment of the district court the plaintiff prosecutes an appeal. The record shows the material facts in the case to be substantially as follows: On February 27, 1886, the legal title to the premises in controversy was vested in Wm. A. Hancock, the common source from which both the plaintiff and the defendant Pemberton deraign title. The said premises were enclosed as one tract, with a dwelling-house
150 situated upon lots 14 and 15, and had been occupied by the defendants Wm. A. Hancock and Lilly B. Hancock as a homestead ever since 1873. On the said 27th day of February, 1886, and while the said premises were so occupied and claimed as a homestead, the said Wm. A. Hancock, for the consideration of love and affection, deeded the same by a direct conveyance to his said wife, Lilly B. Hancock. The value of the said property so conveyed did not at that time exceed the sum of $4,000. On March 5, 1892, certain creditors, Herrick & Luhrs, obtained a judgment in the district court of Maricopa county against the said Wm. A. Hancock for the sum of $2,524.02 upon an indebtedness contracted by him November 1, 1883. An execution was issued upon said judgment April 5, 1892, and the same was levied upon the premises here in controversy as the property of Wm. A. Hancock. No proceeding was had to set aside the anterior conveyance to his wife, but the said real estate was formally sold under said execution to the plaintiff, George H. N. Luhrs, to whom a sheriff's deed was made, on February 4, 1893, conveying the title which is the basis of his ejectment suit. On March 21, 1892, the said Lilly B. Hancock and Wm. A. Hancock had borrowed from one Robert Allstatter the sum of $2,600, and on the same day, to secure the payment thereof, had executed to the said Allstatter a mortgage upon all of the aforesaid premises. This mortgage, presumably executed in good faith, was subsequently foreclosed, and the defendant Thomas W. Pemberton became the purchaser at the foreclosure sale. He received the sheriff's deed for the said premises on February 14, 1895, took possession thereof from the Hancocks, and has since paid the taxes and made valuable improvements upon the property. The plaintiff Luhrs was never in the possession of the premises.

Several propositions of error are assigned, but, as we view
151 it, the case turns wholly upon the question of the validity and effect of the deed of Wm. A. Hancock to Lilly B. Hancock, executed February 27, 1886. If by that conveyance there was effected a transfer of the legal title to this real estate, then the appellant, claiming solely under an execution sale upon a judgment against Wm. A. Hancock, must fail. Hence it is essential to a reversal that the appellant established the invalidity of this conveyance. He attempts to do so, and upon three different grounds. It is first insisted that the deed from Hancock to his wife was ineffectual to pass title to the homestead because it was not signed and acknowledged by the wife, and therefore not in compliance with the statute in force at the time (par. 2141, Comp. Laws), which prescribed that "no mortgage, sale, or alienation of any kind whatever of such land (homestead) by the owner thereof, if a married man, shall be

valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband." The policy of statutes which restrain the alienation of the homestead without the wife joining in the deed is to protect the wife and to enable her to protect the family in the possession and enjoyment of a homestead, after one has been acquired by the husband. They are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance. Thompson on Homesteads, sec. 473. Under statutes similar to this of Arizona it has been held that a conveyance of the homestead to the wife by the husband is not within the meaning of the statute, and is valid, although the wife does not join.

Lynch *v.* Doran (Mich.), 54 N. W., 882; Harsh *v.* Griffin (Iowa), 34 N. W., 441; Burkett *v.* Burkett (Cal.), 20 Pac., 715; Furrow *v.* Athley (Neb.), 33 N. W., 208; Albright *v.* Albright, (Wis.), 36 N. W. 254.

152 We adopt this construction as the true meaning and spirit of the law in preference to the more rigid and literal interpretation adhered to in the Illinois cases cited by counsel for the appellant. It would be a foolish and senseless act for the wife to join in a conveyance to herself, and we cannot think the statute contemplates any such absurd requirement. The deed to Mrs. Hancock from her husband was clearly not in derogation of her homestead rights nor could it impair or affect the homestead, since the joint act of both would still be required for its alienation or incumbrance to a third person. Par. 1972, Comp. Laws. Again, it is urged that by act No. 68, Sess. Laws 1885, the common law was in force in this Territory when the conveyance was made, and that at common law a deed between husband and wife was void. The enactment relied upon to support this proposition is as follows: "The common law of England, so far as it is consistent with and adapted to the natural and physical condition of this Territory and the necessities of the people thereof, and not repugnant to or inconsistent with the Constitution of the United States or bill of rights or laws of this Territory or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all the courts of the Territory." It is here plainly apparent that the legislative will was not to adopt the common law as it prevailed when the wife was the mere chattel of the husband. The old common-law rule, based upon the unity of the husband and wife, which restricted transactions between them, has been practically abrogated in this country by statutes conferring enlarged and separate rights upon married women, and is inconsistent with the legislation of this Territory upon the subject as it existed when this conveyance was made. Comp. Laws, par. 1960 *et seq.* In the case of Jones *v.* Clifton,
153 101 U. S., 225, Mr. Justice Field, delivering the opinion of the court, said: "The technical reasons of the common law arising from the unity of husband and wife, which would prevent a direct conveyance of the property from his to her for a

valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her. The intervention of trustees, in order that the propeety conveyed may be held as her separate estate beyond the control or interference of her husband, though formerly held to be indispensable, is no longer required." The fact that the deed in this case was made by Hancock directly to his wife is not sufficient, in our judgment, to warrant us in holding the instrument to be invalid; but it is finally asserted that the conveyance was in fraud of the rights of appellant as a creditor of Wm. A. Hancock, and therefore void for this reason. The property was at the time the homestead of the Hancocks; such was the finding of the trial court, based upon ample evidence. The character of the homestead exemption, as defined by the statutes then in force, was as follows: "The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances and the water rights and privileges pertaining thereto, sufficient to irrigate the land, not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale or execution, or any other final process from a court, for any debt or liability contracted or incurred after thirty days from the passage of this act, or if contracted or incurred at any time in any other place than in this Territory." Par. 2140, Comp. Laws. As will be seen, this law effectually excluded the homestead from all remedies of creditors in all courts. No execetion or other writ could be made a lien against it, nor could the creditor have a claim upon it in any form. Under such circumstances could the
154 homestead be the subject of a fraudulent conveyance? The whole doctrine of annulling fraudulent conveyances rests upon the ground that the creditor has a right to resort to the property, and where he has no such right it is impossible that a conveyance can be deemed fraudulent. Surely a creditor cannot, in legal contemplation, be defrauded through a conveyance made by his debtor of property which the creditor has no right by law to appropriate or even touch by any civil process. Bump, in his work on Fraudulent Conveyances, says: "Property which is exempt by a positive statute from liability for the owner's debts is not susceptible of a fraudulent alienation. The creditors cannot be said to be creditors as to that particular property so as to make a transfer of it a matter of concern to them." The same principle is stated by Mr. Justice Paine in Pike *v.* Miles, 23 Wis., 164, when, in considering the effect of a conveyance by the husband to his wife of the homestead, he says that such a "conveyance cannot be held fraudulent as to creditors, for the reason that, being exempt, it was no more beyond their reach after the conveyance than before." In Wilson *v.* Taylor (Kan.), 31 Pac., 697, it was declared that "a conveyance of a homestead or other exempt property, even though made with intent to defraud creditors, vests the title thereof in the grantee, and does not become subject to the lien of a judgment previously obtained by a creditor of the grantor." In fact, the principle that a homestead cannot be made the subject of a fraudulent conveyance is well sustained by the authorities.

Derby *v.* Weyrich, 8 Neb., 174; Carhart *v.* Harshaw, 45 Wis., 340; Blair *v.* Smith (Ind.), 15 N. E., 817; Buckley *v.* Wheeler (Mich.), 17 N. W., 216; Railway Co. *v.* Smersh, 36 N. W., 139; Hixon *v.* George, 18 Kan., 253; Roser *v.* Fourth Nat. Bank of Wichita (Kan.), 42 Pac., 341; Thompson *v.* Crane, 73 Fed., 327; Cipperly *v.* Rhodes, 53 Ill., 346. Moreover, the record shows that no proceeding
155 was ever brought to set aside as fraudulent the conveyance from Hancock to his wife, and no execution was levied under the judgment against him until after the lien of the Allstatter mortgage had attached, through which the defendant Pemberton derived title. We conclude, therefore, that the deed from the husband vested in Lilly B. Hancock the title to the premises in controversy in this case, and that no interest passed to the appellant by virtue of the attempted execution and sale of said premises as the property of Wm. A. Hancock. Our conclusion upon this point is decisive against the appellant and renders it unnecessary to notice the other questions sought to be raised. The judgment of the district court is affirmed.

GEO. R. DAVIS, *A. J.*

We concur.
RICHARD E. SLOAN, *A. J.*
FLETCHER M. DOAN, *A. J.*

Webster Street, C. J., did not sit in the hearing of this case.

GEORGE H. N. LUHRS, Appellant,
vs.
WM. A. HANCOCK ET AL., Appellees.

No. 669. Notice of Appeal and Motion & Order Staying Remittitur. June 2nd, 1899.

In this cause Mr. Thomas Armstrong, attorney for appellant, in open court gave notice of appeal from the judgment of this court to the Supreme Court of the United States, and moved the court that it fix the amount of the bond on appeal, and that the remittitur herein be stayed for sixty days; whereupon it was ordered by the court that the amount of the cost bond on appeal in this cause be fixed in the sum of one thousand dollars, and that the remittitur herein be stayed for sixty days.

156 Supreme Court, Territory — Arizona.

GEO. H. N. LUHRS, Plaintiff & Appellant,
vs.
WILLIAM A. HANCOCK, LILLY B. HANCOCK, and Thomas W. Pemberton, Defendants and Appellees.

No. 669. Allowance of Appeal to Supreme Court of the United States. Filed July 28th, 1899. Lloyd Johnston, Clerk.

The above-named plaintiff and appellant, Geo. H. N. Luhrs, conceiving himself aggrieved by the order entered on June 2, 1899, in the above-entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States, and he prays that this

his appeal may be allowed and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

July 22, 1889.

HAMILTON & ARMSTRONG,
Attorneys for Plaintiff and Appellant, G. H. N. Luhrs.

And now, to wit, on this 22nd day of July, 1899, it is ordered that the appeal be allowed as prayed for.

GEO. R. DAVIS,
Associate Justice Supreme Court of Arizona.

157 Supreme Court, Territory of Arizona.

GEORGE H. N. LUHRS, Plaintiff and Appellant,
vs.
WILLIAM A. HANCOCK, LILLY B. Hancock, and Thos. W. Pemberton, Defendants and Appellees.

No. 669. Bond on Appeal to Supreme Court of the United States. Filed August 5th, 1899. Lloyd Johnston, Clerk.

Bond.

Know all men by these presents that we, George H. N. Luhrs, as principal, and Edward Eisele, P. T. Hurley, and J. D. Marlar, as sureties, all of the county of Maricopa and Territory of Arizona, are held and firmly bound unto William A. Hancock, Lilly B. Hancock, and Thos. W. Pemberton in the just and full sum of one thousand ($1,000) dollars; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22nd day of July, 1899.

The condition of the above obligation is such that whereas lately, at a session of the supreme court of the Territory of Arizona, in a suit in said court between Geo. H. N. Luhrs, as plaintiff and appellant, and William A. Hancock, Lilly B. Hancock, and Thos. W. Pemberton, as defendants and appellees, a final judgment was rendered against the said Geo. H. N. Luhrs, and the said George H. N. Luhrs having obtained an allowance of appeal to the Supreme Court of the United States and filed a copy thereof in the office of the clerk of said supreme court of Arizona to reverse the said judgment and decree in the aforesaid suit, and a citation directed to said William A. Hancock, Lilly B. Hancock, and Thos. W. Pemberton, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, sixty days after the date thereof:

158 Now, therefore, the condition of this obligation is such that if the said Geo. H. N. Luhrs shall prosecute said appeal to effect and answer all damages and costs if he fail to make said

appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

GEO. H. N. LUHRS.
EDWARD EISELE.
P. T. HURLEY.
J. D. MARLAR.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Edward Eisele, P. T. Hurley, and J. D. Marlar, the sureties in the foregoing bond, being first duly sworn, on oath say, each for himself and not one for the other, that he is a resident and freeholder of said county of Maricopa, and is worth the sum of one thousand dollars ($1,000) in property within said Territory of Arizona over and above his just debts and liabilities and over and above his property exempt from execution.

EDWARD EISELE.
P. T. HURLEY.
J. D. MARLAR.

Subscribed and sworn to before me this 27th day of July, 1899.
My commission expires 9, 2, 1900.

SHIRLEY CHRISTY,
[NOTARY SEAL.] *Notary Public.*

Approved:
FLETCHER M. DOAN,
Justice Supreme Court Arizona.

159 In the Supreme Court of the Territory of Arizona.

GEORGE H. N. LUHRS, Appellant, *vs.* WM. A. HANCOCK, LILLY B. HANCOCK, and Thomas W. Pemberton, Appellees.	No. 669. Statement of Facts and Exceptions to Evidence. Filed Nov. 13th, 1899. Lloyd Johnston, Clerk, by Angie B. Parker, Deputy.

Objections and Exceptions to the Admission and Rejection of Evidence.

Be it remembered that on the trial of this case in the court below, to wit, the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, the following evidence was offered by the plaintiff, appellant herein, and objected to, and on objection of the defendants, appellees herein, the same was rejected by the court, and exceptions thereto, and to such rulings of the court made at the time; also the following evidence produced by the defendants, the appellees herein, objected to by the plaintiff, the appellant herein, and received by the court over such objection, to which an exception was entered at the time, viz:

"Defendants offer this deed in evidence, from W. A. Hancock to Lilly B. Hancock, dated on the 27th of February, 1886, for this

same property. Plaintiff objects to the introduction of the deed upon this ground: that it is a deed purporting to be given by W. A. Hancock to his wife for the consideration of love and affection for the premises in dispute, and it is shown by the evidence
160 already in that the debt which was finally merged into the Luhrs judgment, and upon which he obtained his deed, was in existence at the time of this deed, and, further, this defendant, W. A. Hancock, was without the power to make this conveyance to his wife, and that it was in fraud of his creditors."

The COURT: "I will overrule that objection as to the admission of the deed in evidence." Plaintiff excepted to the ruling of the court. Deed identified as Defendants' Exhibit No. 2. "Plaintiff makes further objection to the introduction of the deed that it is not sufficient for a deed of a homestead. It was a free gift from him, regardless of its being a homestead, under that act. If he made the deed to her because it was a homestead then it divests him of that homestead. He cannot make this deed to her unless the deed is made under the statute in relation to the conveyance of a homestead." Objection overruled, and the defendants excepted to the ruling of the court.

Question to the witness William A. Hancock:

"Did you make application for a homestead from the Government of the United States for land on the other side of the river?"

Defendants objected to the question as incompetent. Objection sustained; to which the plaintiff then and there excepted.

Plaintiff then offered to show by this witness that on the 19th day of June, 1888, the witness made his application for a homestead to the Government of the United States for the N. W. ¼ of sec. 2, T. 1 N., R. 3 E., and filed his application in the United States land office at Tucson at the time; that he afterwards completed
161 his homestead proofs and received from the Government of the United States the certificate of the receiver of the land office for that piece of land as his homestead, and offered in evidence a certified copy of that application, his affidavit in support of the same, and all the proof made by him on the application; to all of which the defendants objected as incompetent; which objection was sustained by the court, and the plaintiff excepted.

Question to the witness William A. Hancock:

"When was your wife first adjudged insane?"

Defendants objected as immaterial and that the question cannot be raised in this issue. No ruling.

Q. "Your wife, Lilly B. Hancock, has been insane, has she not?"

Objected to by the defendant Pemberton that the question was irrelevant. Objection sustained by the court; to which the plaintiff excepted. It was thereupon stipulated by counsel that the following evidence might be offered with the same effect as though the

probate judge of this county were actually upon the stand with his records:

Plaintiff offers to show by the probate judge of this county that on the 23rd day of March, 1886, Lilly B. Hancock, the defendant in this case, was adjudged to be insane by a decree of the probate court of this county, and the plaintiff offered in evidence page 99 of the Insane Record; to which the defendants objected on the ground that it was immaterial and that it cannot be put into this suit as a collateral attack upon the defendants' title; which objection was sustained by the court, and the plaintiff excepted.

Q. "State whether on the 21st of March, 1892, your wife
162 was insane."

To which the defendants objected as immaterial. Objection sustained by the court, and the plaintiff excepted.

Q. "State whether or not your wife, Lilly B. Hancock, was insane and continued to be insane from the 21st of March, 1892, down to and including the year 1895."

To which the defendants objected on the ground that it was immaterial. Objection sustained, and the plaintiff excepted.

The defendants then offered in evidence a mortgage and note, together with the record of the same, executed by William A. Hancock and Lilly B. Hancock to Robert Allstatter, covering the lands in question and dated March 21, 1892; to the introduction of which the plaintiff objected for the reason that the defendant Lilly B. Hancock was at that time insane and incompetent to execute it; which objection was overruled by the court, and the plaintiff excepted; whereupon the mortgage and record thereof were admitted in evidence and filed as Defendants' Exhibits Nos. 3 and 3¼.

It is hereby certified that the above and foregoing evidence was admitted by the district court below over the objections and exceptions of the plaintiff or denied admission in evidence on the objection of the defendants, and that all such rulings were excepted to as above, as appears by the record in this cause.

Dated this 31st day of October, 1899.

By the court:

GEO. R. DAVIS,
Associate Justice of the Supreme Court of Arizona.

163 In the Supreme Court of the Territory of Arizona.

GEORGE H. N. LUHRS, Appellant,
vs.
WM. A. HANCOCK, LILLY B. HANCOCK, and THOMAS W. PEMBERTON, Appellees.

Statement of Facts.

This was an action by the appellant to recover possession of five certain lots in the city of Phœnix and for the value of the rents

and profits thereof. The complaint is in the usual form in ejectment cases. The defendants William A. Hancock and Lilly B. Hancock, husband and wife, answered, pleading "not guilty" and setting up the statute of limitations in bar of plaintiff's right to recover. Similar defenses were interposed by the defendant Thomas W. Pemberton, who, by way of cross-complaint, also pleaded his ownership and possession of said premises and asked for affimative relief as against the adverse claims of the plaintiff. Upon the trial in the court below the plaintiff was adjudged to have no right, title, or interest in said property, and the defendant Pemberton was adjudged to be the owner and entitled to the possession thereof. From this judgment of the district court the plaintiff prosecutes an appeal.

The record shows the material facts in the case to be substantially as follows: On February 27, 1886, the legal title to the premises in controversy was vested in Willaim A. Hancock, the common source from which both the plaintiff and the defendant Pemberton deraign title. The said premises were inclosed as one tract, with a dwelling-house situated upon lots 14 and 15, and had
164 been occupied by the defendants William A. Hancock and Lilly B. Hancock as a homestead ever since 1873. On the said 27th day of February, 1886, and while the said premises were so occupied and claimed as a homestead the said William A. Hancock, for the consideration of love and affection, deeded the same by a direct conveyance to his said wife, Lilly B. Hancock. The value of the said property so conveyed did not at that time exceed the sum of $4,000. On March 5, 1892, certain creditors (Herrick & Luhrs) obtained a judgment in the district court of Maricopa county against the said William A. Hancock for the sum of $2,524.02 upon an indebtedness contracted by him November 1, 1883. An execution was issued upon said judgment April 5, 1892, and the same was levied upon the premises here in controversy as the property of William A. Hancock. No proceeding was had to set aside the anterior conveyance to his wife, but the said real estate was formally sold under said execution to the plaintiff, George H. N. Luhrs, to whom a sheriff's deed was made on February 4, 1893, conveying the title which is the basis of his ejectment suit. On March 21, 1892, the said Lilly B. Hancock and William A. Hancock had borrowed from one Robert Allstatter the sum of $2,600, and on the same day, to secure the payment thereof, had executed to the said Allstatter a mortgage upon all of the aforesaid premises. This mortgage, presumably executed in good faith, was subsequently foreclosed, and the defendant Thomas W. Pemberton became the purchaser at the foreclosure sale. He received the sheriff's deed for the said premises on February 14, 1895, took possession thereof from the Hancocks, and has since paid the taxes and made valuable improvements upon the property. The plaintiff Luhrs was never in the possession of the premises.

165 It is hereby certified that the foregoing is a correct state-

ment of the facts as shown by the record in the above-entitled cause.

Dated this 31st day of October, 1899.

By the court:

GEO. R. DAVIS,
Associate Justice of the Supreme Court of Arizona.

On appeal from the supreme court of the Territory of Arizona.

GEORGE H. N. LUHRS, Appellant, *vs.* WM. A. HANCOCK, LILY B. HANCOCK, and Thomas W. Pemberton, Appellees.	No. 669. Assignment of Errors. Filed Nov. 15th, 1899. Lloyd Johnston, Clerk, by Angie B. Parker, Deputy.

Comes now the appellant, George H. N. Luhrs, and assigns, makes, and files the following assignment of errors of the supreme court of the Territory of Arizona in the above-entitled cause in the record herein:

I.

The supreme court of Arizona erred in not finding that it was error for the trial court to admit in evidence, when offered by the defendant- over the plaintiff's objection, the deed from Murphy, as sheriff, to the plaintiff Luhrs, being Defendants' Exhibit No. 1, for the reason that the plaintiff was not claiming title under said deed in this action, and the same was not a valid deed.

II.

The supreme court of Arizona erred in not finding that it was error for the trial court to admit in evidence, when offered
166 by defendant- over the plaintiff's objection, the deed dated February 27th, 1886, from W. A. Hancock to his wife, Lily B. Hancock, because the same is void as a conveyance for the following reasons:

First. It was and is void by the common law, which was in force in Arizona at the time of making of said deed.

Second. It was and is void because not made in accordance with, but contrary to, the statute of Arizona at that time restricting the conveyance of homesteads.

Third. The evidence shows that said deed was made by Hancock to his wife for the purpose of defrauding his creditors by putting the title to the real estate therein described in her name and then claiming other real estate as his homestead, and his deed to her was therefore a fraud on his creditors, and especially the plaintiff, whose claim then existed against Hancock.

III.

The supreme court of Arizona erred in not holding and adjudging said deed to be void for the foregoing reasons.

IV.

The supreme court of Arizona erred in not finding that the trial court erred in refusing to allow the plaintiff on the trial to show by the Defendants' witness, Hancock, also a defendant in this case, and by the record then offered in evidence that he, Hancock, had at the same time claimed and was claiming other lands than those in dispute herein as his homestead.

V.

The supreme court of Arizona erred in not finding that it was error in the trial court in refusing on the trial to allow the
167 plaintiff to show the insanity of Lily B. Hancock at and about the time that her husband, W. A. Hancock, executed the deed to her in evidence.

VI.

The supreme court of Arizona erred in not finding that the trial court erred in refusing on the trial to allow the plaintiff to show by the probate records the insanity of Lily B. Hancock at the time and prior to the time of the execution of the mortgage purporting to be by Hancock and wife to Allstatter, under which the defendant Pemberton claims title, and in receiving said mortgage in evidence.

VII.

The supreme court of Arizona erred in finding and holding that all the premises in dispute herein were, on February 27, 1886, the homestead of the defendants W. A. and Lily B. Hancock.

VIII.

The supreme court of Arizona erred in not holding and deciding that the trial court erred in finding that the defendant W. A. Hancock conveyed the property in dispute to his wife by the deed of March 6, 1886, as a settlement upon his wife, and that by said deed the title to said real estate vested in her, and that such conveyance did not impair the claims of any existing creditors and was not intended as a fraud on his creditors.

IX.

The supreme court of Arizona erred in not holding and deciding that the trial court erred in finding as a conclusion of law that the plaintiff did not have, at the time of the commencement of this action, any right, title, or interest in the property in dispute herein.

X.

The supreme court of Arizona erred in not holding and
168 deciding that the trial court erred in finding as a conclusion of law that the defendant T. W. Pemberton was, at the time of the commencement of this action and at the date of such finding, the owner in fee of the premises in dispute herein and was entitled

to judgment declaring his title good and valid and debarring the plaintiff from asserting title thereto.

XI.

The supreme court of Arizona erred in not holding and deciding that it was error for the trial court to find and adjudge that the plaintiff has no right, title, or interest in the premises in dispute, because such findings by the trial court were unsupported by and contrary to the evidence and record herein.

XII.

The supreme court of Arizona erred in affirming the judgment of the trial court herein because the same was and is contrary to the evidence in the case and contrary to the law applicable thereto.

XIII.

The supreme court of Arizona erred in not reversing the findings and judgment of the trial court herein as contrary to the law and the evidence.

XIV.

The supreme court of Arizona erred in each and all of its findings and statements of facts, as shown by the evidence in the record herein.

XV.

The supreme court of Arizona erred in its findings, conclusions, and judgments of the law herein, and such findings, conclusions, and judgments were not supported by the record in this case.

169 XVI.

The judgment of the supreme court of Arizona is not supported by the facts or the law and should be reversed.

By HAMILTON & ARMSTRONG,
Attorneys for George H. N. Luhrs, Appellant.

170 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Territory of Arizona, } ss:

I, Lloyd Johnston, clerk of the supreme court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 169, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of George H. N. Luhrs, appellant, against Wm. A. Hancock, Lilly B. Hancock, and Thomas W. Pemberton, appellees, as the same remain of record and on file in said office.

I further certify that Plaintiff's Exhibits Numbers 1, 2, 3, 4, and 5 and Defendants' Exhibits Numbers 1, 2, 3, 3½, 4, 5, and 5½ are true and correct copies of the papers they purport to be.

Also that the citation is the original citation issued by said supreme court of the Territory of Arizona.

Seal Supreme Court of Arizona.

In testimony whereof I have caused the seal of the said supreme court of the Territory of Arizona to be hereunto affixed, at the city of Phœnix, in the Territory of Arizona, this 17th day of November, A. D. 1899.

LLOYD JOHNSTON,
Clerk of the Supreme Court of the Territory of Arizona,
By ANGIE B. PARKER,
Deputy Clerk.

171 UNITED STATES OF AMERICA, *ss:*

To William A. Hancock, Lilly B. Hancock, and Thomas W. Pemberton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 2nd Monday *day* of October, 1899, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Arizona, wherein Geo. H. N. Luhrs is appellant and you, the said William A. Hancock, Lilly B. Hancock, and Thos. W. Pemberton, are appellees, to show cause, if any there be, why the judgment rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of July, 1899.

GEO. R. DAVIS,
Associate Justice Supreme Court of Arizona.

[Endorsed:] No. 669. Supreme court Arizona. Geo. H. N. Luhrs, appellant, *vs.* W. A. Hancock *et al.*, appellees. Citation. Due service of within citation admitted Sept. 5, 1899. Joseph Campbell, att'y for appellees Hancock and Hancock. C. F. Ainsworth, att'y for appellee Pemberton. Filed July 28th, 1899. Lloyd Johnston, clerk.

Endorsed on cover: File No., 17,596. Arizona Territory supreme court. Term No., 176. George H. N. Luhrs, appellant, *vs.* William A. Hancock, Lilly B. Hancock, and Thomas W. Pemberton. Filed January 3, 1900.

No. 176

FILED
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 176.

GEORGE H. N. LUHRS, APPELLANT,

vs.

WILLIAM A. HANCOCK, LILLY B. HANCOCK AND THOMAS W. PEMBERTON, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Supreme Court of the Territory of Arizona, affirming a judgment of the District Court of the Third Judicial District of Arizona, in and for the County of Maricopa, in an action brought by the appellant, George H. N. Luhrs, against the appellees, Hancock and Hancock and Pemberton, to recover possession of certain lots in the city of Phoenix, Arizona, being an action in ejectment

This suit was commenced by plaintiff Luhrs, February 1, 1896, against Hancock and wife, who were then in possession of the premises in controversy.

The dwelling house on one lot of the five in question having burned down, and Hancock and wife quit possession, defendant Pemberton was put in possession of the lots in question by the sheriff, March 5, 1896, and from that date to the present, has remained in sole possession of the premises, and is defending this suit on claim of superior title in himself.

The plaintiff Luhrs claims judgment in ejectment in this suit on title in him as follows:

In a suit by Herrick & Luhrs vs. W. A. Hancock, judgment was rendered against W. A. Hancock, March 5, 1892 (or, as shown by the record, judgment was rendered March 7th, as of March 5, 1892.) (Rec. pp. 56–57.)

April 5, 1892, execution was issued and levy made on this judgment. (Rec. p. 58.)

July 2, 1892, sale was made on this execution by John Montgomery, sheriff of Maricopa County, to plaintiff Luhrs, of all five of the lots in question. (Rec. p. 60.)

February 4, 1893, John Montgomery, as late sheriff, and as the sheriff who made the sale on execution, executed and delivered a sheriff's deed to plaintiff Luhrs, pursuant to the sale on execution. This is the sheriff's deed upon which we rely. (Rec. p. 61.)

It is true that on January 4, 1893, J. K. Murphy, the then sheriff of Maricopa County, who was not the sheriff who made the sale, executed and delivered to Luhrs a sheriff's deed. But that deed was invalid, because it was not made by the sheriff who made the sale, as we shall show in our brief herein.

The sheriff's deed from Montgomery, late sheriff, who made the sale, alone is valid, and on it the plaintiff relies for his title.

Defendant Pemberton relies for his title on a pretended deed made by defendant Hancock to his wife, Lily B. Hancock, February 27, 1886, while Hancock was claiming the real estate in question as a homestead. Mortgage by Hancock and wife to Robert Allstatter on all the lots, dated March 21, 1892 (sixteen days after the date of judgment under which plaintiff Luhrs purchased his title). Judgment on foreclosure of mortgage of Allstatter vs. Hancock and wife, rendered May 10, 1894, and sale thereunder to defendant Pemberton, August 11, 1894; and sheriff's deed to Pemberton, February 14, 1895, under which Pemberton was put in possession by the sheriff, as we have seen, March 5, 1896. (Rec. pp. 70 to 89.)

The above respective claims of plaintiff Luhrs and defendant Pemberton set out the real contest in this case.

The title to the real estate in question and the matters principally affecting the same are shown in evidence, and are briefly, as follows:

The common source of title claimed by both parties, is through the defendant Wm. A. Hancock. (Rec. p. 20.)

Hancock married in 1873. Went to live on Lots 14 and 15 of Block 77. Afterwards acquired lots 16, 17 and 18. House on lots 14 and 15. (Rec. p. 27.)

November 10, 1883. Wm. A. Hancock mortgaged to Ellis & Co. lots 15, 16, 17 and 18. Mortgage afterwards assigned to Herrick & Luhrs. (Rec. p. 41-42.)

December 17, 1883. Hancock and wife mortgaged lots 14, 15, 16, 17 and 18 to Herrick & Luhrs. (Rec. p. 42.)

September 21, 1885. Herrick & Luhrs commenced suit in District Court on both mortgages and notes. (Rec. p. 45.)

February 27, 1886. Hancock conveyed lots 14, 15, 16, 17 and 18 to wife, Lily B. Hancock. (Rec. p. 27-66.)

March 7, as of 5th, 1892 Judgment rendered vs. W. A. Hancock at suit of Herrick & Luhrs in District Court, Maricopa Co. (Rec. pp. 56-57-58.)

March 21, 1892. Mortgage, Hancock and wife to Robert Allstatter, on lots 14, 15, 16. 17 and 18. (Rec. pp. 34–67.)

April 3, 1892. Execution issued and levy made on Herrick & Luhrs' judgment on lots 14, 15, 16, 17 and 18. (Rec. p. 58.)

July 2, 1892. Sale on execution to Luhrs of lots 14, 15, 16, 17 and 18 on his judgment by John Montgomery, sheriff. (Rec. pp. 59-60)

January 4, 1893. Sheriff deed (J. K. Murphy, sheriff) to Geo. H. N. Luhrs, on sale of July 2, 1892. (Rec. pp. 63-64.)

February 4, 1893. Sheriff deed (John Montgomery, late sheriff) to Geo. H. N. Luhrs on sale of July 2, 1892. (Rec. pp. 61-62.)

April 4, 1894. Action commenced by Allstatter vs. Hancock and wife, Luhrs and Pemberton to foreclose mortgage of March 21, 1892. (Rec. p. 70.)

Both Luhrs and Pemberton answer, claiming liens prior to the mortgage by judgments, and suit dismissed as to them. (Rec. pp. 79-82-83.)

May 10, 1894. Judgment, Allstatter vs. Hancock and wife. (Rec. pp. 83-84-85.)

August 11, 1894. Sale to Pemberton on Allstatter foreclosure. (Rec. pp. 87-88-89.)

February 14, 1895. Deed to Pemberton on Allstatter foreclosure.

February 1, 1896. Luhrs commenced this suit against Hancock and wife, then in possession. (Rec. pp. 1-2.)

March 5, 1896. Pemberton put in possession under Allstatter foreclosure sale. (Rec. p. 27.)

March 3, 1898. Pemberton made a party to this action by amendment on order of the Court, and served with summons and complaint. (Rec. pp. 4-6.)

The testimony of Wm. A. Hancock, the principal witness in the case, is that at the time he made the deed to his wife Lilly B. Hancock, of the premises in question, he did not own any property exempt from execution.

"Q. Then at the time of making this deed to your wife in 1886 you didn't own any real or personal property, except the property you conveyed to your wife?

A. No, sir; none excepting what was exempt from execution."

(Testimony of W. A. Hancock. Rec. pp. 30-31.)

And at that time suit had already been commenced against Hancock by this plaintiff Luhrs to recover the debt for which this property was seized and sold to him on execution. (Rec. pp. 31-45.)

The property in question was not the homestend of the defendant Hancock at the time he conveyed it to his wife.

The statute of Arizona, as it stood February 27, 1886, the date of the deed from Hancock to his wife, provided (Compiled Laws, 1877, page 364, paragraph 2140): "The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, and the water rights and privileges pertaining thereto * * * not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale on execution, or any other final process from a Court, for any debt or liability contracted or incurred after thirty days from the passage of this Act, or if contracted or incurred at any time in any other place than this Territory."

Hancock testified, "I suppose I called it my home, yet I was not living there all of the time. I called it the homestead of my family, and I lived on the other side of the river a part of the time." (Rec. p. 31.)

The plaintiff offered to show by this witness that such land was not claimed by him as a homestead, but he was claiming a homestead under the Public Land Laws elsewhere, which however, was rejected by the trial Court, (Rec. p. 31.) and is elsewhere alleged as error.

The witness further testified that a part of the time his wife lived on the lots in question and a part of the time in California.

"I had a room in the house that I occupied sometimes and a part of the time it was rented." (Rec. p. 31.)

If the lots in question were claimed by Hancock as a homestead, he did not convey them to his wife in the manner in which alone a homestead could be conveyed under the Arizona Statute in force at that time. The Compiled Laws of 1877, providing (Paragraph 2141:) * * "But no mortgage, sale or alienation, of any kind whatever, of such land by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband." She failing to join in the deed with her husband.

Not only was the conveyance void as a conveyance under this statute but it was also void under the Common Law, which had, prior to the date of the deed, been declared in force in Arizona, it being a conveyance directly from the husband to the wife.

"The Common Law of England, so far as it is consistent with and adapted to the natural and physical conditions of this Territory and the necessities of the people thereof, and not repugnant to, or inconsistent with the constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all the Courts of this Territory." Act No. 68, Session Laws of Arizona, 1885.

The answers of the defendants, in addition to their pleas of not guilty, and of title in themselves, set up the statute of limitations, but the District Court, which tried the case, and the Supreme Court of Arizona on appeal, considered only the question of the validity and effect of the deed of Wm. A. Hancock to Lilly B. Hancock, executed February 27, 1886, and to that this brief will be mainly devoted. Although it is well here to call attention to the offer of the plaintiff Luhrs, as a matter of defense to the title claimed by the defendant Pemberton, to show that Lilly B. Hancock, at the time of the execution of the mortgage to Allstatter under a foreclosure of which Pemberton claims title, was insane and incompetent to make such mortgage. Which offer was rejected by the trial court. (Rec. pp. 32-33-97-98.)

ASSIGNMENT OF ERRORS.

Comes now the appellant George H. N. Luhrs, and assigns, makes and files the following assignment of errors of the Supreme Court of the Territory of Arizona, in the above entitled cause in the record herein.

I.

The Supreme Court of Arizona erred in not finding that it was error for the trial court to admit in evidence, when offered by the defendant, over the plaintiff's objection, the deed from Murphy, as sheriff, to the plaintiff Luhrs, being defendant's exhibit No. 1, for the reason that the plaintiff was not claiming title under said deed in this action, and the same was not a valid deed.

II.

The Supreme Court of Arizona erred in not finding that it was error for the trial court to admit in evidence, when offered by defendant, over the plaintiff's objection, the deed dated February 27th, 1886, from W. A. Hancock to his wife, Lily B. Hancock, because the same is void as a conveyance for the following reasons:

First. It was and is void by the common law, which was in force in Arizona at the time of making of said deed.

Second. It was and is void because not made in accordance with, but contrary to, the Statute of Arizona at that time restricting the conveyance of homesteads.

Third. The evidence shows that said deed was made to Hancock to his wife for the purpose of defrauding his creditors by putting the title to the real estate therein described in her name and then claiming other real estate as his homestead, and his deed to her was, therefore, a fraud on his creditors and especially the plaintiff whose claim then existed against Hancock.

III.

The Supreme Court of Arizona erred in not holding and adjudging said deed to be void for the foregoing reasons.

IV.

The Supreme Court of Arizona erred in not finding that the trial court erred in refusing to allow the plaintiff on the trial to show by the defendant's witness, Hancock, also a defendant in this case, and by the record then offered in evidence, that he, Hancock, had, at the same time claimed, and was claiming, other lands than those in dispute herein as his homestead.

V.

The Supreme Court of Arizona erred in not finding that it was error in the trial court in refusing on the trial to allow the plaintiff to show the insanity of Lily B. Hancock, at and about the time that her husband, W. A. Hancock, executed the deed to her, in evidence.

VI.

The Supreme Court of Arizona erred in not finding that the trial court erred in refusing on the trial to allow the plaintiff to show by the Probate Records the insanity of Lilly B. Hancock at the time and prior to the time of the execution of the mortgage purporting to be by Hancock and wife to Allstatter, under which the defendant Pemberton claims title, and in receiving said mortgage in evidence.

VII.

The Supreme Court of Arizona erred in finding and holding that all the premises in dispute herein, were, on February 27, 1886, the homestead of the defendants, W. A. and Lilly B. Hancock.

VIII.

The Supreme Court of Arizona erred in not holding and deciding that the trial court erred in finding that defendant, W. A. Hancock, conveyed the property in dispute to his wife by the deed of March 6, 1886, as a settlement upon his wife, and that by said deed the title to said real estate vested in her, and that such conveyance did not impair the claims of any existing creditors and was not intended as a fraud on his creditors.

IX.

The Supreme Court of Arizona erred in not holding and deciding that the trial court erred in finding, as a conclusion of law, that the plaintiff did not have, at the time of the commencement of this action, any right, title or interest in the property in dispute herein.

X.

The Supreme Court of Arizona erred in not holding and deciding that the trial court erred in finding as a conclusion of law,

that the defendant, T. W. Pemberton, was, at the time of the commencement of this action, and at the date of such finding, the owner in fee of the premises in dispute herein and entitled to judgment declaring his title good and valid and debarring the plaintiff from asserting title thereto.

XI.

The Supreme Court of Arizona erred in not holding and deciding that it was error for the trial court to find and adjudge that the plaintiff has no right, title or interest in the premises in dispute because such findings by the trial court were unsupported by, and contrary to, the evidence and record herein.

XII.

The Supreme Court of Arizona erred in affirming the judgment of the trial court herein because the same was, and is, contrary to the evidence in the case and contrary to the law applicable thereto.

XIII.

The Supreme Court of Arizona erred in not reversing the findings and judgment of the trial court herein as contrary to the law and the evidence.

XIV.

The Supreme Court of Arizona erred in each and all of its findings and statements of facts, as shown by the evidence in the record herein.

XV.

The Supreme Court of Arizona erred in its findings, conclusions and judgments of the law herein, and such findings, conclusions and judgments were not supported by the record in this case.

XVI.

The judgment of the Supreme Court of Arizona is not supported by the facts or the law and should be reversed.

ARGUMENT FOR THE APPELLANT.

I.

The Supreme Court of Arizona erred in not finding that it was error for the trial court to have admitted in evidence the deed from Murphy, as sheriff, to the plaintiff, Luhrs, being defendants' Exhibit 1, for the reason that the plaintiff was not claiming title under said deed in this action, and the same was not a valid deed.

The plaintiff in this case is claiming title to the lots in dispute through a sale of the same to him on an execution issued upon a judgment of the District Court of Maricopa County, Arizona, which judgment was signed March 7, 1892, to operate as of March 5, 1892. (Rec. pp. 56-7-8.)

The sale on execution was made by John B. Montgomery, the then sheriff of Maricopa county, (Rec. pp. 59-60-61) and the deed thereon was made by said Montgomery, as "formerly sheriff of the county of Maricopa," on the 4th day of February, 1893, which deed appears at p. 61, of the Record.

It was under this deed alone that the plaintiff claimed title to the real estate, but the trial court permitted the defendants to offer in evidence another deed running to this plaintiff, dated January 4, 1893, made upon the same execution sale as the deed offered by the plaintiff, but made by Murphy, as sheriff. Murphy being the sheriff who succeeded Montgomery. (Rec. p. 26.)

To this offer the plaintiff objected, for the reasons, first, that he was not claiming title under this deed so offered, and, second, because this deed was invalid, not being made by the sheriff who made the sale.

The sheriff who made the sale, and not his successor in office, is the only proper person to make the deed to the purchaser at the execution sale.

There was then no statutory provision in this Territory requiring a succeeding sheriff to execute a deed on a sale made by his predecessor, and without such provision the common law rule must prevail, and the sheriff who made the sale must make the deed, notwithstanding he is out of office.

That this is the common law rule, see:

People vs. Boring, 8 Cal., 407, opinion of Field, C. J., p. 408, and cases there cited.

Our statute on redemptions requires the redemption to be made to "the officer who made the sale." Sec. 23, Act 20, Laws 1889. This is held by Field, C. J., in the case last cited, to mean "the sheriff who made the sale," and that the term officer is limited to the incumbent who performed the act of sale.

People vs. Boring, supra, 411.

Freeman, in his work on executions, lays down the rule in this language:

"Where the term of the officer who made the sale terminates, his power to make the conveyance continues. In fact, unless the new sheriff is specially authorized by statute he seems to have no authority whatever to make a conveyance based on a sale made by his predecessor."

Freeman Executions, Sec. 327.

Had the plaintiff in this case brought his action relying upon the deed made by J. K. Murphy, the succeeding sheriff, and dated Jan. 3, 1893, instead of on the deed executed by John B. Montgomery, the former sheriff, who made the sale, and dated Feb. 4, 1893, the defendant might well have objected to his title and the Court would have been justified in holding, as was held in California, "That where the plaintiff's complaint in ejectment averred title in plaintiff under a sheriff's sale made by one sheriff, and deed executed by his successor, *held* that the plaintiff could not recover."

Anthony vs. Wessel, 9 Cal., 103.

A further answer to the defendant's claim as to the title claimed by the plaintiff in this action, is that the plaintiff is not claiming on, and has not offered in evidence, any other deed than the one of February 4, 1893; and it will hardly be held that the defendant in the case can force upon the plaintiff a muniment of title which is void, and under which he does not claim, and thereby defeat his action.

II.

The Supreme Court of Arizona erred in not finding that it was error for the trial court to admit in evidence when offered by defendant the deed dated February 27, 1886, from W. A. Hancock to his wife, Lilly B. Hancock, because the same was void as a conveyance.

First. It was and is void by the Common Law which was in force in Arizona at the time of the making of said deed.

Second. It was and is void because not made in accordance with, but contrary to the Statute of Arizona in force at that time restricting conveyance of homesteads, if the property were homestead.

Third. It was a fraud upon the creditors of W. A. Hancock and especially the plaintiff whose debt against Hancock than existed.

It will be observed that the judgment under which plaintiff Luhrs claims his title was dated March 5, 1892, sixteen days before the date of the mortgage from Hancock and wife to Allstatter, under which the defendant Pemberton claims his title. It therefore follows, as an inevitable conclusion of law, that if the judgment of Herrick & Luhrs vs. W. A. Hancock, of March 5, 1892, became a lien upon the lots in question, then the sheriff's deed to plaintiff on that judgment is superior title to the subsequent sheriff's deed to defendant Pemberton on the foreclosure of the Allstatter mortgage, dated after the Herrick & Luhrs judgment.

But defendants sets up in their answer, and claim in argument, that defendant Hancock, on February 27, 1886, while the premises in question were occupied and claimed by Hancock and wife as their homestead, made a deed direct to his wife, the defendant, Lilly B. Hancock, of the premises, by way of voluntary gift to her, and that thereafter the title was solely in the wife, so that the Herrick & Luhrs judgment of March 5, 1892, could not, and did not, attach as a lien. And they further set up and claim that the Herrick & Luhrs judgment of March 5, 1892, did not attach as a lien on the lots in controversy, because, they say, the premises in controversy were then, March 5, 1892, still the homestead of Hancock and wife. We emphatically deny the correctness of each and both these propositions of defendants.

We most confidently insist that the deed from W. A. Hancock to his wife was not only void as to his pre-existing creditors, because, if it conveyed or transferred any interest of Hancock in the property, then it was a fraud on existing creditors, and void as to them; but, so far as the deed from Hancock to his wife attempted to convey title to the alleged homestead to her, it was absolutely null and void.

We insist that if the contention of counsel for defenda s in

this case is correct as to the validity of this deed made by Hancock direct to his wife as a gift, then, under such construction of the statutes and laws of Arizona, it is easily within the power of a failing debtor in Arizona to convey an unlimited amount of real estate, by way of gift to his wife, in open fraud of his creditors, and thus cheat them out of their debts, and retain great wealth in real estate. The process would be simple and easy. Under the statutes of Arizona a homestead was made exempt from legal process and forced sale by the simple filing of a declaration of homestead by the husband as the head of a family upon land described, to the value of $4,000, as required by the statute. Such homestead may in like manner be released or abandoned by the husband by filing at any time thereafter in the recorder's office a declaration of abandonment, as provided in the statute. So if a husband, although insolvent, may make a valid gift direct to his wife of the homestead he has declared on today, so that she may hold the real estate as her own after it is abandoned or in any manner lost as a homestead, then he may in like manner, after he has deeded to her as a gift the first $4,000 worth of real estate, on which he has filed declaration of homestead, and she has recorded her deed to the same, the next day file his declaration of abandonment of homestead on the property deeded to his wife, and then immediately file a new declaration of homestead on a new piece of real estate worth $4,000, in like manner convey that to his wife by direct deed of gift, and so continue the process until he has covered up an unlimited amount of real estate, in open, bare-faced fraud of his creditors, and they are powerless to prevent.

This would be the necessary condition of affairs in this Territory if the Courts should hold the contention of defendants' counsel to be correct, that the deed from Hancock direct to his wife, by way of gift, conveyed to her the absolute title of the real estate comprised in the homestead, to be held by her thereafter as against Hancock's creditors and all the world, even after it was divested of its homestead character, simply because it may have been claimed as a homestead at the time he made the deed to her.

Such a construction and result, being so monstrous and intolerable, leads us to carefully consider where the fault in defendants' contention lies.

1. At common law a deed of real estate from the husband direct to the wife was void at law, without regard to whether it was for a homestead or not.

Tillaux vs. Tillaux (Cal., 1897), 47 Pac. R. 694.

The deed from Hancock to his wife was made February 27, 1886. In 1885 the Legislature of Arizona enacted that the common law was in force in Arizona. See Session Laws of Arizona, 1885, Act No. 68. Quoted p. ante.

The common law being in force then, in 1886, when this deed was made, a deed from a husband to his wife of real estate owned by him was absolutely void at law, unless there was at that time some statute in Arizona which abrogated the common law and permitted the husband to make a deed of real estate direct to the wife. No such statute existed in Arizona in 1886. In California there was a statute expressly abrogating the common law in that respect and permitting the husband and wife to make deeds of real estate directly to each other.

In all the States where common law was in force, it has been found necessary to enact a statute authorizing conveyances of real estate directly between husband and wife, as in California and Illinois, as shown by the decisions cited. And those statutes were of slow growth and are of comparatively recent enactment in all the States where the common law was adopted by statute.

We therefore repeat that in Arizona, while the Legislature in 1885 adopted the common law, it did not enact any statute abrogating the common law so as to allow a husband to make a deed of real estate direct to his wife, and no such statute existed in Arizona when this deed from Hancock to his wife was made, February 27, 1886; and it was therefore void in law without regard to the question of homestead in the premises, and cannot be set up in this suit at law as a defense.

2. A deed of the real estate comprised in the homestead by the husband directly to the wife while they still continue to occupy it as a homestead, and no change is made in the charater of the occupation or possession of the premises by them as a homestead, is null and void for any and all purposes, because such deed and conveyance is not made in accordance with the requirements of the statute of Arizona providing how homesteads shall be conveyed, and providing that conveyance made in any other manner is void.

The statutes of Arizona, and especially those in force in 1886, when this alleged conveyance was made, like those of the States on homesteads, are designed to exempt the home of the husband, wife and family to a reasonable limit of value from forced sale and process of all kinds, and preserve it to them as long as they occupy it as a homestead, and also further protect it by providing

that it may be sold and transferred only by the joint deed of the husband and wife, and that then the proceeds of it are also protected for reinvestment in another home.

But neither the statutes of Arizona, nor any State, on homesteads, design that they may be used by the husband or head of the family as a means of defrauding his creditors beyond the continuance of one specific homestead exempted.

The statute of Arizona, as it stood February 27, 1886, the date of the deed from Hancock to his wife, provided (Compiled Laws, 1877, page 364, paragraph 2140): "The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, and the water rights and privileges pertaining thereto * * * not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale on execution, or any other final process from a Court, for any debt or liability contracted or incurred after thirty days from the passage of this Act, or if contracted or incurred at any time in any other place than this Territory."

Paragraph 2141: * * "But no mortgage, sale or alienation, of any kind whatever, of such land by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband."

(The Court will bear in mind that the lots in controversy belonged to the husband, Hancock, and the title stood of record in his name until he made this pretended deed to his wife, February 27, 1886.)

A careful examination and analysis of the foregoing statute discloses that it, in plain and emphatic terms, prohibits and renders invalid any attempted mortgage, sale or alienation of any kind whatever of the homestead by the owner thereof, if a married man, except it be a bona fide sale or alienation of the real estate by the joint deed of the husband and wife, duly acknowledged by the wife, separately and apart from the husband. It does not authorize or contemplate any mortgage, sale or alienation in any other manner whatsoever. So it seems to us to plainly declare on its face, and by its terms, the absolute invalidity of a deed of homestead executed by the owner and husband alone to his wife. And such must be its reasonable and proper construction.

The naturally inherent invalidity of the deed from husband to wife, when the property is purely a homestead—the title being in

the husband, and being, outside the homestead, community property, as in this case—also occurs to us forcibly.

A deed from the husband to the wife under such circumstances —where no separation exists or occurs between the husband and wife, no change of the possession or of the character of occupation as a homestead jointly by the husband and wife takes place, and the property remains a homestead for the husband as well as the wife, and community property as before—conveys nothing, transfers nothing new to the wife, divests the husband of nothing, and invests the wife with nothing. In other words, it is not a transfer and conveyance of the homestead, as contemplated and provided for by the statute on conveyance of homesteads.

But we are not left to our own construction of this statute. It has recently been most thoroughly passed upon and construed, as we insist it should be, by some of the most eminent Supreme Courts in the Union.

In the State of Illinois the Supreme Court has very ably and exhaustively discussed this question in a long line of recent cases, coming down to that of Despain vs. Wagner, decided in November, 1896, and in every case has firmly held that a deed from husband or wife, having the record title to the homestead directly to the other, is invalid, null and void.

The statute of Illinois on conveyance of homestead, under which these cases were decided, is identical in substance with that of Arizona above quoted. It is as follows: "No conveyance of it shall be valid unless it is in writing, subscribed by said householder, and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned or given pursuant to the conveyance."

See statute quoted as above in Despain vs. Wagner, 163 Ill., 601. In that case the wife had the title to the real estate comprised in the homestead, and while she and her husband were occupying it as a homestead, the wife made a deed of it directly to the husband. After the death of the wife—leaving no children—her heirs at law filed a bill against the devisees of the deceased husband to set aside the deed of the wife to the husband, of the homestead. The Supreme Court declares, in deciding the case:

That "a deed is not invalid merely because it is made directly by the wife to the husband, as, under the statutes of the State, a conveyance by a husband directly to his wife, or by the wife directly to her husband, is valid so far as to vest all the title capable of being transferred by the instrument of conveyance."

The Court quotes the statute as quoted above, and say that the statutory requirement as to conveyance of homestead must be held to apply to deeds made by householders to their wives, and that a conveyance of the homestead not exceeding $1,000.00 in value (the limit of value in that State) by a householder to his wife, she not joining therein, is inoperative to pass the title to the homestead estate, and the Court further says: "It must be accepted as the settled law of this State, that a deed to a homestead by the householder, even to his or her wife or husband, not subscribed and acknowledged by such wife or husband (possession not being abandoned or given pursuant to the conveyance) is a nullity," and the Court held in the case that the deed from the wife to the husband, though valid so far as it conveyed the excess in value over $1,000.00, the limit of homestead value, was a nullity so far as it attempted to convey the homestead estate, not exceeding $1,000.00. And the Court held that the fee title of the homestead remained in the wife at her death, notwithstanding her deed to her husband, and descended to her heirs at law. And the opinion of the Court cites and reaffirms the following cases:

Anderson vs. Smith, 159 Ill., 93.
Haggerty vs. Haggerty, 149 Ill., 655.
Barrows vs. Barrows, 138 Ill., 649.
Kitterlin vs. Milwaukee Mechanics Ins. Co., 134 Ill., 647.

In the last cited case the Court, after quoting the statute says:

"We said in Browning, et al., vs. Harris, et al.: 'Since the homestead in such a case (where the total value does not exceed $1,000) comprises the entire interest (of the householder in the premises), it follows that any conveyance by the owner which does not conform to the requirements of the statute with respect to the conveyance of homesteads, will be inoperative and void as to such homestead.' And it was further said: 'The Legislature having, in plain and unmistakable terms, declared that certain forms and ceremonies shall be observed in the conveyance of a homestead, Courts have no power to dispense with them. On the contrary, it is their manifest duty to enforce their observance.' And the Court further said in their opinion: 'For wise and humane reasons, to preserve to the debtor and his family a home and shelter, the estate is, by express enactment, secured to the husband and wife, and no waiver, release or conveyance of it can be valid that is not, by their joint voluntary act and consent, expressed in manner and form prescribed in the statute. We are

not at liberty to defeat, by construction, the plain and clearly expressed will of the Legislature, nor to dispense with the safeguards it has provided against the improvident alienation or relinquishment of the estate. The husband, who is the owner of the title to which the homestead attaches, cannot, by any act of his own, waive, release, relinquish or convey the homestead; unless abanboned, or alienedd, or released by the joint act of himself and wife in the mode prescribed, it continues, despite any act or deed of his, for the benefit of himself and family during his life, and for their benefit after his decease. Nor does it affect this conclusion, that the children of the householder cannot be said to have a vested interest in the estate during his life. True, the interest of the children is under the control of the parents, and may be defeated by them before vesting in the children; but it can only be done in some one of the modes prescribed by the statute. Nor does it affect this consideration, that the conveyance is, here, to the wife.' * * * But it is unnecessary to pursue the discussion further. The Legislature has said, in unambiguous language, that such deeds are without validity. The premises, or any interest in them, being incapable of severance from the estate of homestead therein, and the deed from Kitterline to his wife being without validity as a conveyance of the homestead estate, effected no change of title. Being void, the title of Kitterline was unaffected thereby."

Such is the thorough, strong and irresistible reasoning and conclusion of the Supreme Court of Illinois upon the exact question, and under a statute exactly to the same effect as the statute of Arizona, at the time Hancock made this deed of the homestead to his wife, as we have shown. And the Court will bear in mind that the evidence in the case at bar shows that all these lots claimed in 1886 by Hancock as a homestead, and as such attempted to be conveyed by him to her by deed direct, were at that time worth much less than the $5,000 fixed as the limit of value for homesteads, and, therefore, the homestead alone was comprised in the deed. But we are not required to rely alone upon this very strong and unbroken line of decisions in Illinois, conclusive as they are, to establish our contention that the deed from Hancock to his wife of these premises, being then a homestead, was absolutely null and void.

The same doctrine is announced in Massachusetts, in Cannon vs. McMurray, 2 Allen, 202; Castle vs. Palmer, 6 Allen, 403. Also in Thompson on Homesteads and Exemptions, Sec. 474, where the author says: "Where the statute provides that, in

order to make a valid conveyance of the homestead, the wife of the owner must join in the deed, a conveyance of the homestead by the husband alone is held by most Courts to be *void*, not only as to the wife, but also as to the husband." And in a foot-note to the text, cites, to sustain it, cases from Michigan, Iowa, Massachusetts, Kansas, Tennessee, Texas, Wisconsin and California. In Barber vs. Babel, 36 Cal., 31, cited, the Court there says, speaking of the statute providing the only mode of conveyance of the homestead where once established: "The question of policy is one for the Legislature alone, as the representatives of the people. It is no part of our duty to throw obstacles in the way of the operation of the law, or to seek, by construction, to frustrate the policy adopted; but on the contrary, our duty is to carry out its provisions in good faith, according to the true interest and spirit of the law, as gathered from its provisions, when read by the light of surrounding circumstances. And, under its provisions, we are of opinion that there is a joint estate, or interest, in the homestead, vested in the husband or wife, which can only be divested by the concurrent act of the husband and wife, so long as she continues a resident of the State, and that this interest can no more be affected without her concurrence in the mode prescribed, than the ordinary estates in the lands of others without the concurrence of the parties holding them."

So, we say with perfect assurance and confidence, that the deed from Hancock to his wife, of February 27, 1886, relied on by all these defendants, was absolutely null and void, and the fee title of the premises remained in Hancock to these lots, just as if he had not made this deed to his wife. What then follows?

HANCOCK AND WIFE LOST HOMESTEAD IN THE PREMISES.

Hancock and wife having failed to claim a homestead, or any exemption, under the statute in force when this judgment was obtained and execution levied, cannot now, nor can their grantee, set it up to defeat the plaintiff's title.

Our statute on homestead exemptions, in force when this action was tried, was enacted March 10, 1887, Title XXXIII R. S., and requires, as an absolute prerequisite to the exemption, a declaration in writing, verified, filed and recorded in the office of the County Recorder. It is admitted that no such declaration has ever been made, and that five years elapsed from the passage of the Act until the rendition of the judgment in the levy and sale under which the plaintiff claims, i. e., from March 10, 1887, to March 7, 1892.

Did the homestead, acquired by Hancock and wife prior to 1887, by reason of their residence on a portion of these lots, continue after 1887, notwithstanding their failure to comply with the law? If it did, then the Court must legislate into the statute of 1887 a clause which does not appear therein, and reading about as follows: "Provided, however, that all homesteads, heretofore acquired by residence, shall continue to be exempt without any declaration whatsoever, as though the foregoing provisions of this statute never had gone into effect."

Under the California homestead act of 1851, residence and occupation, as a home for the family, was all that was required to render land exempt up to a certain value. In 1860 and 1862 the homestead law was so changed as to require, in addition to residence, a declaration in writing, filed and recorded substantially, as by our statute of 1887, as well as residence.

The question then arose in that State, as to whether the effect of the amendment was to release the homestead acquired under the old law and totally deprive the debtor of a homestead already acquired, unless he made the newly required declaration, and it was held: "That homesteads, acquired under the Act of 1851, lose the character of homesteads and become liable to forced sale on execution, unless the declaration provided for in the Act of 1860, is made and filed," and this, notwithstanding continued occupying as a home.

Noble vs. Hook, 24 Cal., 638.
Estate of Reed, 23 Cal., 410.
Bartholomew vs. Hook, 23 Cal., 278.

"Nothing can make the premises a valid, protected homestead without such a declaration as the statute requires."

Bareham vs. Bryan, 23 Pac., 212.

"Nor can it be claimed that vested rights were interferred with by the passage of our homestead law of 1887. This claim was made in California under the law of 1860, and dismissed by the Supreme Court of that State."

Noble vs. Hook, 24 Cal., 638 (640).

"The homestead exemption is a privilege, a matter of grace or favor, and not a vested right."

Sparger vs. Compton, 54 Ga., 359.

The privileges extended to debtors by existing exemption laws are not, as to the particular property which comes within

their protection, vested rights. The Legislature may modify these laws by general enactment, affecting all debtors alike.

Bull vs. Conroe, 13 Wis. (233).

It will be observed that five years elapsed from the passage of this later homestead act to the taking effect of Luhrs' judgment, and no attempt was made by Hancock or his wife during all that time to avail themselves of its benefits. So no argument can be based on the fact that no reasonable time was given them to comply with the terms of the new law, which, by its terms, went into effect on its enactment.

3. The deed from Hancock to his wife was also void as a fraud upon his creditors, and especially this plaintiff, whose claim then existed against Hancock.

If it could possibly be said under the evidence in this case that Hancock had any interest in these lots at the time he made the deed to his wife, outside of, or over and above, the homestead, which he could convey by direct deed to her, then such interest, if any, in addition to or over and above the homestead, was conveyed to her in fraud of his creditors and with intend to defraud them, when, as the evidence shows, Hancock was wholly insolvent and all his property, except this homestead, was in the hands of an assignee and insufficient to pay his debts. Under such circumstances he could not make a deed of any property direct to his wife without its being void as to his creditors.

In ejectment, where one party relies upon title derived through a deed made by husband to wife as a gift, when the husband did not at the time retain sufficient property to pay existing debts, a sale of such land upon execution by a creditor, whose debt existed at the time the property was deeded to the wife, and deed under such sale, will prevail against the title so derived through the wife.

Terry vs. O'Neal & Son, 71 Tex., 594.
Belt vs. Raguet, 27 Tex., 481.

Where a husband conveyes property to his wife to defraud creditors, it is immaterial to the rights of the creditors whether the wife participated in the fraud or not.

Knapp vs. Day, 34 Pac., 1008.

When a husband conveys property to his wife, the moving cause being to place it beyond the reach of his creditors, it will be subjected to judgments against him.

Ryan vs. Meyer (Mich.), 66 N. W., 667.

In a voluntary conveyance by way of gift by a husband to his wife, in fraud of creditors, it is immaterial whether the wife knew of, or participated in the fraudulent intent of the husband, it is void.

Wilson vs. Spear, (Vt.), 34 A., 429.

Where the husband conveys property to the wife, as against existing creditors, the burden is on the wife to show that the transaction was not fraudulent as to creditors.

Claflin vs. Ambrose, 19 So., 628.
Manning vs. Carmithers, 34 A., 254.
Noyes vs. Harrison, 23 S. E., 560.
Seasongood vs. Ware, 16 So., 51.

To render a voluntary conveyance by a husband to his wife valid as against prior creditors, the burden of proof is on the grantee to show that the debtor retained sufficient property to pay his debts.

Hoffman vs. Nolte, (Mo.), 29 S. W., 1006.

A conveyance by an insolvent debtor to his wife is presumptively fraudulent as to such creditors, and the burden is on the one claiming through it to prove the contrary.

Glass vs. Zutavern (Neb.), 61 N. W., 579.

It must be conceded now that we have established our proposition that the judgment of Herrick & Luhrs vs. W. A. Hancock, March 5, 1892, was at once a lien on the lots, and the sheriff's sale and deed thereunder to plaintiff Luhrs established a good title in him to the lots in controversy, and the sheriff's deed, on which we rely for title, was the only proper and *valid sheriffs deed.*

The Supreme Court of Arizona erred in sustaining the action of the trial court in refusing to allow the plaintiff to show that at the time the defendant Hancock was claiming the land in question as a homestead he was claiming other lands as a homestead.

On the trial of the cause, the plaintiff, to rebut the claim of the defendant, W. A. Hancock, that the lands in question were a homestead, asked said Hancock, who was then on the stand:

Q. Did you make application for a homestead from the gov-

ernment of the United States for land on the other side of the river?

Defendant objected to the question as incompetent. Objection sustained.

Plaintiff offers to show by this witness that on the 19th of June, 1888, witness made his application for a homestead to the government of the United States for the Northwest ¼ of Section 2, Township 1 N., Range 3 E., and filed his application in the United States land office at Tucson at the time. That he afterwards completed his homestead proofs and received from the government of the United States the certificate of the receiver of the land office for that piece of land as his homestead, and offered in evidence a certified copy of that application, his affidavit in support of the same, and all the proofs made by him on the application.

Defendants object to the offer to prove as incompetent, etc. Objection sustained, and plaintiff excepted. (Rec. p. 97.)

It seems to the appellant that this error is so patent that no citation of authority is needed to sustain it. Certainly a man cannot claim or have two homesteads at the same time. Neither can the exemption laws be so extended that a married man can have a homestead in one part of the county and his wife one in another. And had the plaintiff been permitted to make the showing he offered to make by this witness, it can readily be seen that it would have gone far toward disproving the defendants' claim to the property in dispute as a homestead, and so entirely overturning the claim of the defense and the entire theory upon which the Supreme Court affirmed the judgment of the court below.

The Supreme Court of Arizona erred in not finding that it was error in the trial court to refuse to allow the plaintiff to show the insanity of Lilly B. Hancock at and subsequent to the time her husband, W. A. Hancock, executed to her the deed upon which the defendants rely.

It cannot, with any degree of fairness or truth, be presumed that Wm. A. Hancock, by his deed to his wife for this property, intended it as a "*settlement*" upon her for her benefit. His wife was at that time insane, and had been for sometime before, as we offered to show by evidence. We offered in evidence the records of the Probate Court of Maricopa County, to show that on the 23d of March, 1886, less than a month after the deed was made

to her, she was adjudged to be insane by a decree of the Probate Court, and we offered to prove that she had been insane for a long time before that. This evidence was excluded by the Court, and plaintiff excepted. The evidence was competent and should have been admitted; for, if the evidence showing she was insane at the time had been admitted, as it should have been, it would have been impossible to fairly presume that Hancock was honestly making a settlement of this real estate upon his wife, by his deed of conveyance direct to her, when she was insane, and incapable of lawfully accepting the deed of settlement, or of disposing of the property for her benefit. Under such circumstances, if honestly intended as a settlement upon and for the benefit of his wife, he would have conveyed it to a trustee, who could have handled it and conveyed the title for her benefit. It was clearly error not to admit this evidence of her insanity at the time, and for the purposes of this argument it must be considered as having been admitted.

Another and further reason why this testimony should have been admitted is that the title and all the title of the defendant, Pemberton, who is adjudged by the decree in the case to be the owner of the property, comes through a mortgage made subsequent to the plaintiff's judgment lien, and it necessarily follows that if Mrs. Hancock was insane, as the plaintiff offered to show, she was incompetent to make this mortgage, and Pemberton, therefore, took no title whatsoever. This error is fully set forth in the Record. Specific offers were made by the plaintiff to prove this insanity (Rec., pp. 33-97-98) and the plaintiff also objected to the offer of the mortgage under which the defendant claimed title because Lilly B. Hancock was insane and incompetent to execute it. (Rec., p. 34.)

Our Assignment of Error X is specifically directed to this portion of the decree, and, unless the defendant Pemberton did show a valid title from Mrs. Hancock, the decree is certainly erroneous, and a new trial should have been granted for the error of the trial court in refusing to allow the plaintiff to show her incompetency to convey at any time after she obtained her alleged title from her husband.

The Supreme Court of Arizona erred in its holding that all the premises in dispute herein were on February 27, 1886 the homestead of the defendants, W. A. and Lilly B. Hancock.

This holding, upon which the Supreme Court of Arizona bases its decision of this case, is made without discussion or examination of the evidence and seems to be based entirely upon the finding of the trial court, regardless of the facts. It is settled by the Supreme Court in one short sentence: "The property was at the time the homestead of the Hancocks; such was the finding of the trial court, based upon ample evidence," and this is the entire review which the facts of this case received on the appeal. The same evidence is before this court that was before both the Arizona courts, and we claim that it is neither ample nor satisfactory in establishing the homestead character of these lots and all of them at the time Hancock made his deed to his wife—1886. The evidence on this point is very brief and is mainly contained on p. 28 of the Record, Hancock there testifving that he lived on the lots in 1886 and had done so since 1873 with his family, that their value was $3,000 to $3,500, that his family was there and he was there most of the time; that it was his home and his family's home. Yet on cross examination the witness says he was not living there all the time; he called this the homestead of his family while he lived "on the other side of the river" a part of the time. That his wife was there a part of the time and a part of the time in California; that sometimes he occupied a room there and sometimes it was rented (Rec., p. 31). Now we submit that this is extremely unsatisfactory evidence upon which to establish a claim to homestead to all these lots, five in number, under the homestead laws of Arizona in force in 1886, and which have been hereinbefore quoted.

There is no evidence in this case that the lots in question were within the definition of a homestead "consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, * * * not exceeding in value the sum of $5,000." There is absolutely nothing in the evidence to show upon which of these lots the dwelling-house, or its appurtenances, if there were any, was situated; and while Hancock probably did have a homestead right in such of the lots as were covered by the dwelling and its appurtenances, this right could not be extended over all adjoining lots he might have then owned, without some further proofs than were made in this case. The test under a statute similar is said to be use and value.

"The premises are such and only such as the parties are residing on and using as a homestead."

Gregg vs. Bostwick, 33 Cal., 220.

Having thus considered the errors in the record, which entitle the plaintiff and appellant to a reversal of this judgment, we desire briefly to consider also the argument of the defendants and appellees upon these and other branches of the case, not touched upon in the decison of the Supreme Court of Arizona.

STATUTE OF LIMITATIONS.

All the defendants set up in their answers that the defendant, Lilly B. Hancock, was in the adverse possession of the lots in question under the deed from her husband, since February 17, 1886, and until defendant Pemberton got possession, March 5, 1896, and that, therefore, our action is barred by Section 2297, Revised Statutes of Arizona, which is as follows:

"Every suit, to be instituted to recover real property, as against any person in peaceable and adverse possesion thereof, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards."

Our answer to this point of defendant is clear for several reasons.

First. As we have seen, the deed from Hancock to his wife was utterly null and void for all purposes, and was not therefore title or color of title in Lilly B. Hancock.

Second. The possession of the husband and wife in joint occupancy of premises as a home is presumed in law to be the possession of the husband.

Collins vs. Lynch, (Pa.), 27 A. T., 721.

Third. The possession of Hancock and wife after the Herrick & Luhrs judgment, March 5, 1892, against Hancock *was not adverse* possession as against the purchaser of the premises at sheriff's sale and the holder of the sheriff's deed thereunder. Hancock and wife having lost their homestead right therein by failure to declare it, as required by the statute of 1887.

"Where the property conveyed to the wife as a gift was then, and continued to be, in the possession of the husband and wife, such continued possession will not be adverse possession of the wife as against creditors defrauded, so as to ripen the title of the wife, under the statute of limitations, as against the creditors."

Belt vs. Raguet, 27 Tex., 481.

The continued possession of the judgment debtor, whose land has been sold under execution, is not adverse to the title of the purchaser at the sheriff's sale.

Cook vs. Norton, et al , 48 Ill., 22.

Referring to the chronological table at the beginning of this argument, and bearing in mind the evidence in this case, the Court will find that the Sheriff's sale on the execution in the judgment of Herrick & Luhrs vs. W. A. Hancock was made on July 2, 1892, by John Montgomery, sheriff. At that time W. A. Hancock and wife were in possession of the premises and residing there.

February 4, 1893, John Montgomery, as ex-sheriff, made his sheriff's deed to plaintiff Luhrs. Hancock and wife were then in possession and residing on the premises.

February 1, 1896, Luhrs commenced this action against Hancock and wife, who were still in possession and residing on the premises.

That Hancock remained in possession until March 5, 1896, when Pemberton was put in possession under a sheriff's deed to him, dated February 14, 1895, on the judgment of foreclosure of the mortgage of Allstatter vs. Hancock and wife. Judgment dated May 10, 1894, and sale thereon August 11, 1894.

So it is readily seen that from the time of the sheriff's sale to March 5, 1896, Hancock and wife were in possession of, and lived on, the premises, but had no homestead rights or exemption in the same, not having filed declaration of homestead, as required by the statute of 1887, and their possession during that time is held by all courts, and must be held here, as the possession of W. A. Hancock, the judgment debtor in the judgment of Herrick & Luhrs vs. Hancock.

As we have seen from the authorities above cited, the possession of the premises by the judgment debtor, after sale on execution, *is not*, and cannot be, *adverse* possession, as against the purchaser at the judgment sale. Neither can such possession by the judgment debtor and his wife be such adverse possession as is required by the statute, nor can it ever ripen into a title by limitation.

The language of the statute is clear and plain, and it will not avail for defendants' counsel to argue, as he did in the court below, that the statute ran from the time the plaintiff might have taken his sheriff's deed. His right of action in ejectment does not

"accrue" until he has a deed which gives him the right to commence his suit.

Jefferson vs. Wendt, 51 Cal., 573.

Weiser vs. McDowell, 61 N. W., 1096.

The only remaining defense sought to be set up in this case is that of

RES ADJUDICATA.

This defense is not available to the defendants for many reasons.

In their answers defendants all set up that on September 21, 1885, Herrick & Luhrs commenced suit in the District Court of Maricopa County against Wm. A. Hancock and Lilly B. Hancock on two separate notes and mortgages, one dated November 10, 1883, and made by Wm. A. Hancock to Gus Ellis & Co., the mortgage describing only lots 15, 16, 17 and 18, which was assigned to Herrick & Luhrs; the other note and mortgage dated December 17, 1883, made by Hancock and wife direct to Herrick & Luhrs, and describing in the mortgage all five of the lots in question, and that in that suit Hancock and wife filed answers setting up that when Wm. A. Hancock executed the first of said mortgages without his wife joining him, November 10, 1883, the lots therein described were the homestead of the defendants, Wm. A. Hancock and Lilly B. Hancock, and that, therefore, the mortgage made by Hancock alone was invalid as a lien on them. And the answer of defendant Pemberton in the case at bar alleges, "that in said action the issue was tried between this plaintiff and the said defendants, William A. Hancock and Lilly B. Hancock, as to whether said property was the homestead of the said Wm. A. Hancock and Lilly B. Hancock, his *wife at the time of making said mortgage and at the time of the commencement of said action*," and that upon the issue so raised, the Court in said action decided and determined "that the lands described in this complaint *were at the time of making said mortgage, and at the time of the commencement of said action*, the homestead of the said defendants, Wm. A. Hancock and Lilly B. Hancock," and that said decision is still in force, and is, therefore, *res adjudicata*.

Now, in the first place, the allegations of the defendants' answer as to the facts about the judgment in that former case are not borne out by the record and evidence in this case. The judg-

ment roll in the case of Herrick & Luhrs vs. Hancock et al., was introduced in evidence in this case, and shows:

1. That the only parties to that case were Herrick & Luhrs, plaintiffs, and Wm. A. Hancock, Lilly B. Hancock and Chas. A. Tweed, assignee of Wm. A. Hancock, defendants.

2. That the case was tried three times before the District Court of Maricopa County, and that on the first two trials the judgment rendered by the Court and contained in the judgment roll, expressly held and decided against the claim of homestead in the premises by Hancock and wife, and

3. That on the third and last trial of that case, the judgment as contained in full in the judgment roll, says nothing whatever about the claim of homestead in Hancock and wife. It simply renders judgment in favor of the plaintiff on both the notes in suit and foreclosure of the mortgage made by both Hancock and wife. The judgment nowhere finds or mentions anything about a homestead in Hancock and wife at any time, and does not decide that they had a homestead in the premises at the time of the making of the first mortgage, or at the time of the beginning of the suit, or at any other time. For all that appears in the judgment, the plaintiffs at the third trial may not have asked or urged a judgment of foreclosure on the first mortgage (Rec., p. 56). No homestead was decided to be in Hancock and wife, so far as the judgment shows, and no extrinsic or oral evidence *de hors* the record was offered by the defendants on the trial of the case at bar, to show that the question as to whether the premises were the homestead of Hancock and wife, was in fact decided by the Court in the final judgment in the said case of Herrick & Luhrs vs. Hancock et al. For this reason alone, then, no *res adjudicata* is established. This is made clear by the following case:

Jones vs. Beaman (N. C. 1895), 23 S. E. Rep., 248.

See also to the same effect:

Dygert vs. Dygert (Ind.), 29 N. E., 490.

Stone vs. St. Louis Stamping Co. (Mass.), 29 N. E., 643.

But there is another point against defendants' plea of *res adjudicata*, which is clearly, absolutely conclusive, even if it should be considered or "conjectured" that in the case of Herrick & Luhrs vs. Hancock et al., in the final third trial of that case, as

is alleged in the answer of Pemberton, in this case, the "Court decided and determined, and rendered its judgment accordingly, that said lands described in this complaint were *at the time of making said mortgage, and at the time of the commencement* of said action, the homestead of the said defendants, William A. Hancock and Lilly B. Hancock," that is wholly immaterial in this case, and wholly ineffectual to establish *res adjudicata* in favor of the defendants.

The "time of the making of the mortgage" in question in that suit was November 10, 1883. The "time of the commencement of said action" was September 21, 1885.

The time of the commencement of the present action was February 1, 1896, and the date of the Herrick & Luhrs judgment against Hancock was March 5, 1892, or more than six and a half years after the time when Hancock and wife had a homestead in the premises, as said to have been found by the judgment of the Court in the former suit, as alleged by the answers of the defendants herein. A judgment by the Court in a former suit that Hancock and wife had a homestead in the premises November 10, 1883, the date of the mortgage in the other suit, and also September 21, 1885, the date of the commencement of the suit of Herrick & Luhrs vs. Hancock et al., can by no means be construed as a judgment of the Court that Hancock and wife had a homestead exemption in the lots in controversy on March 5, 1892, the date of the judgment against Hancock, on which our sheriff's deed is based, nor that such homestead exemption existed February 1, 1896, when plaintiff commenced this suit in ejectment.

"An adjudication of right of homestead is only an adjudication of that right up to that time, and is not an adjudication of the status at some subsequent time."

Plummer vs. White, 101 Ill., 474.

It might well be that Hancock and wife had a homestead exemption in a part of the premises September 21, 1885, under the law as it then stood; but as statute laws, as well as individuals, are subject to frequent changes, it would be a very violent presumption to say that because they had a homestead in these certain lots then, therefore they had a homestead in them seven years thereafter. In fact, our theory of this case is that Hancock and wife had a homestead in a part of the lots in controversy on the date of Hancock's mortgage, November 10, 1883, and on the date of the commencement of the Herrick & Luhrs suit, and

retained that homestead until the Act of the Legislature of Arizona went into force in 1887, requiring them, in order to preserve their homestead in the lots, to file a declaration of homestead upon them, as provided in that Act; and not having done so, they lost their homestead exemption in these lots, and that no homestead exemption on these lots existed in their favor at the date of the judgment of Herrick & Luhrs vs. Hancock, March 5, 1892, and that none existed in them at the time of the judgment sale on execution, or of the sheriff's deed to us, or at the time of the commencement of this suit.

The Court will also please remember that W. A. Hancock was a witness on the trial of the case at bar, and testified that neither he nor his wife had ever filed any declaration of homestead upon these lots, as required by the statutes of 1887.

The rule of *res adjudicata* is stated by the highest authorities as follows:

To make a matter *res adjudicata* there must be a concurrence of

1. Identity of the subject matter.
2. Identity of the cause of action.
3. Identity of the persons and parties.

Freeman on Judgments, 3d Ed., 252.

Philipowski vs. Spencer, 63 Tex., 607.

The defendants in this case have not brought themselves within this rule in any of its particulars.

The parties in this case are not the same as in Herrick & Luhrs vs. Hancock et al. Pemberton, who is the chief and only defendant in interest in this case, was not a party to the former suit.

The rights to be decided in this ejectment suit between plaintiff Luhrs and defendant Pemberton, on their respective claims of title, could not have been decided in the former suit, and, therefore, there is here no "identity of the persons and parties."

There is here no "identity of the cause of action." The cause of action in Herrick & Luhrs vs. Hancock et al., was on a note and mortgage, made November 10, 1883, by Hancock, and there was judgment on the note, but no foreclosure of the mortgage, and, so far as the mortgage is concerned, was simply a question as to whether that mortgage, made by Hancock alone, was a valid lien on the property therein described, and, at best, the

Court could only have decided that it was not a valid lien. Here the cause of action is based on a sheriff's deed to plaintiff Luhrs, dated February 4, 1893, based upon a judgment against Hancock, March 5, 1892, and a sheriff's sale thereunder of the lots in controversy, and is an entirely different cause of action.

There is here no "identity of the subject matter," as required by the rule.

Even if it be conceded that the issue was in Herrick & Luhrs vs. Hancock et al., whether a mortgage made by Hancock alone upon the lots in question, the same being then a homestead, was a valid lien upon them, and even if the Court had decided that issue and held that the lots were a homestead at that time, and that, therefore, the mortgage was invalid, still that is not the issue here.

If the lots in controversy are regarded as the subject matter of this suit, then the subject matter of this suit is not identical with the subject matter of the other suit, for lot 14 was not in the Hancock mortgage, and was not involved in that controversy.

But suppose the judgment roll in the foreclosure case of Herrick & Luhrs vs. Hancock et al., did show that the question of homestead in the lots in controversy was there litigated and determined, or suppose that fact had been shown by extrinsic proof, which it was competent to do, what would it amount to in this case?

The only question which the Court could have litigated or determined in that case was whether, *at the date of the mortgage*, made by William A. Hancock to Gus Ellis & Co., the premises therein described were the homestead of Hancock and wife.

That is, were these lots such homestead November 10, 1883, when Hancock alone made the mortgage to Gus Ellis & Co.? If so, then the mortgage was not a lien upon the lots. That is all the Court could have determined in that case.

The Court in that case had nothing to do with the question as to whether Hancock and wife had a homestead in the lots at the time that suit was commenced, or at any other time subsequent to the making of the mortgage, November 10, 1883.

At the best, the Court could only have possibly decided that Hancock and wife had a homestead in the premises November 10, 1883, the date of the mortgage, and, therefore, the mortgage was not a lien on the premises. But, as we have already shown by authorities cited, a judgment that a homestead existed in the lots November 10, 1883, was not a judgment that such homestead existed at any subsequent time, or that such homestead existed

March 5, 1892, the date of our judgment, nearly nine years after such homestead is said to have existed.

We believe we have established our positions impregnably, that the deed from Hancock to his wife was absolutely null and void for two reasons.

1. Because, by the common law then in force in Arizona, the husband could not make a deed, valid in law, direct to his wife.

2. Because such deed was prohibited by the statute restricting and prescribing the manner of conveyance of homesteads, and that the legal title therefore remained in Hancock, in the lots in question.

That Hancock and wife, having failed to preserve their homestead in the lots by filing and recording declaration of homestead upon them, as required by the Act of 1887, they lost their homestead in them, and when our judgment was rendered against Hancock March 5, 1892, it at once became a lien upon the lots, and our levy of execution on them and sale under that judgment, conveyed good title to the plaintiff; and the sheriff who made the sale was the only proper person to execute the sheriff's deed to us.

That the sheriff who made such sale made the deed we rely on to us, and that we commenced this action inside of three years from the date of that deed, and the possession of these lots having been shown to be in fact and in law in the defendant, Wm. A. Hancock, up to March 5, 1896, and such possession not being in law, adverse to our title, we are most clearly and unquestionably entitled to a reversal of this case.

Respectfully submitted,

L. E. PAYSON,

Attorney for Appellant Geo. H. N. Luhrs.

THOS. ARMSTRONG, JR.,

Of Counsel.

JAMES H. MCKENNEY,
Clerk.

Worthington v Pemberton Jr

Supreme Court of the United States.

Appellee Pemberton

OCTOBER TERM, 1900.

Filed Mar 7, 1901

No. 176.

GEORGE H. N. LUHRS, APPELLANT,

vs.

WILLIAM A. HANCOCK, LILLY B. HANCOCK, AND THOMAS W. PEMBERTON.

Appellee,

BRIEF FOR [redacted], THOMAS W. PEMBERTON.

A. S. WORTHINGTON,
C. F. ABBOTT,
Attorneys for Appellee, Thomas W. Pemberton.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-7-'01.

Supreme Court of the United States

OCTOBER TERM, 1900.

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WILLIAM A. HANCOCK, LILLY B. HANCOCK, AND THOMAS W. PEMBERTON.

Appellee.

BRIEF FOR [illegible], THOMAS W. PEMBERTON.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the supreme court of the Territory of Arizona affirming a judgment of the district court of the third judicial district of Arizona in an action of ejectment brought by the appellant, George H. N. Luhrs, against the appellees, William A. Hancock, Lilly B. Hancock, his wife, and Thomas W. Pemberton, to recover possession of certain lots in the city of Phœnix, Arizona.

This action was first brought by the appellant against Hancock and wife (who were then in possession of the

premises in question) on February 1, 1896. Pemberton was made an additional defendant on March 4, 1898, he having been put in possession of the premises by the sheriff on March 5, 1896, and having remained in sole possession of them since the latter date.

The case was tried by consent by the court without a jury (Rec., p. 12). The trial court made the following findings of fact and conclusions of law:

"*Findings of Fact.*

"The court finds that all of the parties to this action are residents of Maricopa county, Arizona Territory.

"2. The court finds that the said defendants, William A. Hancock and Lilly B. Hancock, were on the 27th day of February, 1886, the owners of the property described in the plaintiff's complaint herein, to wit, lots fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), in block seventy-seven (77), of the city of Phœnix, Arizona, and that said property was then and had been for a long time prior thereto the homestead of said defendants, William A. Hancock and Lilly B. Hancock.

"That on said 27th day of February, 1886, the said defendant, William A. Hancock, in consideration of love and affection and as a settlement of a portion of his property on his wife, the defendant Lilly B. Hancock, conveyed to his said wife, Lilly B. Hancock, said property, which deed of conveyance was on the 6th day of March, 1886, duly recorded in the office of the county recorder of Maricopa county, in volume 12 of Deeds, page 359 thereof; that said conveyance did not impair the claims of any existing creditors, and that such conveyance and settlement was not intended by the said defendant, William A. Hancock, as a cover to future schemes or fraud; that thereupon the title to said property became and was vested in the said defendant, Lilly B. Hancock, as her sole and separate property.

"3. That thereafter said defendants, William A. Hancock and Lilly B. Hancock, executed a mortgage on said property to one Robert Alstatter; that thereafter said mortgage was foreclosed, said property sold on said foreclosure sale and bid in by the defendant herein, Thomas W. Pemberton,

and thereupon the said Thomas W. Pemberton entered into possession of said property, and was at the time of the commencement of this action against him in possession of said property, claiming to be the owner thereof in fee under and by virtue of said mortgage and the foreclosure proceedings had thereon.

"*Conclusions of Law.*

"As conclusions of law the court finds that the plaintiff, George H. N. Luhrs, did not have at the time of the commencement of this action any right, title, interest, or claim in or to the property described in the complaint herein or any part thereof.

"That the said defendant, Thomas W. Pemberton, was at the time of the commencement of this action and is now the owner in fee-simple of all of said property.

"That the said defendent, Thomas W. Pemberton, should have judgment against the plaintiff, George H. N. Luhrs, declaring his title in said premises good and valid and forever debarring said plaintiff from asserting any claim whatever in or to said lands and premises adverse to the said defendant, Thomas W. Pemberton, and for his costs and disbursements incurred herein, and that the said defendants, William A. Hancock and Lilly B. Hancock, should have judgment against the plaintiff for their costs and disbursements incurred herein."

Final judgment having been rendered in accordance with these findings for the defendant Pemberton (14), the plaintiff Luhrs appealed to the supreme court of the Territory of Arizona (37).

That court affirmed the judgment (90; see opinion by Davis, J., pages 90 to 94) and made the following—

"*Statement of Facts.*

"This was an action by the appellant to recover possession of five certain lots in the city of Phœnix, and for the value of the rents and profits thereof. The complaint is in the usual form in ejectment cases. The defendants William A.

Hancock and Lilly B. Hancock, husband and wife, answered, pleading 'not guilty' and setting up the statute of limitations in bar of the plaintiff's right to recover. Similar defenses were interposed by the defendant Thomas W. Pemberton, who, by way of cross-complaint, also pleaded his ownership and possession of said premises and asked for affirmative relief as against the adverse claims of the plaintiff. Upon the trial in the court below the plaintiff was adjudged to have no right, title, or interest in said property, and the defendant Pemberton was adjudged to be the owner and entitled to the possession thereof. From this judgment of the district court the plaintiff prosecutes an appeal.

"The record shows the material facts in the case to be substantially as follows: On February 27, 1886, the legal title to the premises in controversy was vested in William A. Hancock, the common source from which both the plaintiff and the defendant Pemberton deraign title. The said premises were inclosed as one tract, with a dwelling-house situated upon lots 14 and 15, and had been occupied by the defendants William A. Hancock and Lilly B. Hancock as a homestead ever since 1873. On the said 27th day of February, 1886, and while the said premises were so occupied and claimed as a homestead, the said William A. Hancock, for the consideration of love and affection, deeded the same by a direct conveyance to his said wife, Lilly B. Hancock. The value of the said property so conveyed did not at that time exceed the sum of $4,000.00. On March 5, 1892, certain creditors (Herrick & Luhrs) obtained a judgment in the district court of Maricopa county against the said William A. Hancock for the sum of $2,524.02 upon an indebtedness contracted by him November 1, 1883. An execution was issued upon said judgment April 5, 1892, and the same was levied upon the premises here in controversy as the property of William A. Hancock. No proceeding was had to set aside the anterior conveyance to his wife, but the said real estate was formally sold under said execution to the plaintiff, George H. N. Luhrs, to whom a sheriff's deed was made on February 4, 1893, conveying the title which is the basis of his ejectment suit. On March 21, 1892, the said Lilly B. Hancock and William A. Hancock had borrowed from one Robert Allstatter the sum of $2,600.00, and on the same day, to secure the payment thereof, had executed to

the said Allstatter a mortgage upon all of the aforesaid premises. This mortgage, presumably executed in good faith, was subsequently foreclosed, and the defendant Thomas W. Pemberton became the purchaser at the foreclosure sale. He received the sheriff's deed for the said premises on February 14, 1895, took possession thereof from the Hancocks, and has since paid the taxes and made valuable improvements upon the property. The plaintiff Luhrs was never in the possession of the premises."

"It is hereby certified that the foregoing is a correct statement of the facts as shown by the record in the above-entitled cause" (99).

In accordance with the act of 1874, quoted below, the supreme court of Arizona also made a statement of the rulings of the trial court "on the admission or rejection of evidence" (96 to 98). It will be seen that these rulings raise only the three following questions:

1. Whether the court erred in admitting in evidence the deed from Hancock to his wife, dated February 27, 1886, conveying to her the homestead property in controversy.

2. Whether the court erred in excluding evidence that more than two years after Hancock had so conveyed the homestead to his wife he made application to the United States for other land as a homestead.

3. Whether the court erred in excluding evidence as to whether Hancock's wife was insane on and after the 23d day of March, 1886, that date being more than a month later than the date of the deed to her from her husband.

In the court below the appellant filed sixteen assignments of error (102). In his brief here he assigns ten errors.

The act of Congress approved April 7, 1874 (18 Stat., 27), is as follows:

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said

Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe:

"*Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree, etc."

This court has held that under this act it is concluded by the findings of fact of the court below, and can consider only such rulings of the trial court as to the admission or rejection of evidence as are certified to it by the supreme court of the State (Harrison *vs.* Perea, 168 U. S., 311; Halloway *vs.* Dunham, 170 U. S., 615; Young *vs.* Amy, 171 U. S., 179).

It will be seen, therefore, that the only assignments of error in the brief for the appellant here which this court will entertain are those numbered respectively 2, 3, and 4.

ARGUMENT.

I.

The deed from Hancock to his wife of March 27, 1886 (66), *was properly admitted in evidence.*

1. The deed was valid because in 1886 it was legal in Arizona for a husband to convey real estate to his wife without the intervention of a trustee.

Appellant contends that this deed from Hancock to his wife, which was made in consideration of love and affection, was void, because at the time it was made the common law was in force in Arizona, and it is claimed that by the common law a husband could not make a deed directly to his wife.

This principle of the common law was founded on the idea that husband and wife were one individual, and hence could not deed from one to the other, as an individual could not deed to himself.

The statute establishing the common law in Arizona, which was in force at the time of this deed from Hancock to his wife (and which is in force now), reads as follows:

Act No. 68, *Laws of Arizona of* 1885.

"The common law of England so far as it is consistent with and adapted to the natural and physical condition of this Territory and the necessities of the people thereof, and not repugnant to, or inconsistent with, the Constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all the courts of the Territory."

In 1871 a statute had been enacted in the Territory (and it has been in force ever since, as well as other statutes on the same lines) providing as follows (Compiled Laws 1877, par. 2000):

"Married women, of the age of twenty-one years and upward, shall have the sole and exclusive control of their separate property; and may convey or transfer lands or any estate or interest therein, vested in or held by them in their own right and without being joined by the husband in such conveyance, as fully and perfectly as they might do if unmarried."

This statute and the other laws establishing the rights of married women had entirely done away with the common-law idea that husband and wife were but one individual, and with it the rule arising from it that a husband could not convey directly to his wife, and the statute adopting the common law in Arizona had expressly excluded such principles

as were inconsistent with the laws of the Territory or customs of the people.

No such technical legal rule was in force in Arizona at the time of this transaction. The reasoning of this court in the case of Jones *vs.* Clifton, 101 U. S., 225, is applicable. In that case the court said:

"The technical reasons of the common law, arising from the unity of husband and wife, which would prevent a direct conveyance of the property from him to her, for a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her."

The supreme court of Arizona in deciding the present case held that the statute establishing the common law in Arizona has not been construed as requiring that a deed from a husband to his wife is void (92); and as this is largely a question of custom and policy, it would seem to be more a finding of fact than the decision of a question of law.

2. This deed from Hancock to his wife was a valid deed, because at the time this deed was made this property was the homestead of Hancock, and it was at that time legal for a husband to deed a homestead to his wife without his wife signing the deed.

(*a.*) It was Hancock's homestead at the time, as is found by both courts below and practically admitted by the appellant.

Appellant expressly states in his brief, page 29, as follows:

"In fact, our theory of this case is that Hancock and wife had a homestead in a part of the lots in controversy on the date of Hancock's mortgage, November 10, 1883, and on the date of the commencement of the Herrick and Luhrs suit, and retained that homestead until the act of the legislature of Arizona went into force in 1887."

Even without this admission this court would accept as final the finding of the supreme court of Arizona on this subject (Young *vs.* Amy, 171 U. S., 179).

The Arizona statute establishing the homestead, which was in force at the time of the deed from Hancock to his wife, read as follows:

Compiled Laws of 1877, *Section* 2140.

"The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances and the water rights and privileges pertaining thereto, sufficient to irrigate the land, not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale or execution, or any other final process from a court, for any debt or liability contracted or incurred after thirty days from the passage of this act, or if contracted or incurred at any time in any other place than in this Territory."

(*b.*) That this property was Hancock's homestead at the time of the deed from him to his wife was *res adjudicata* as to the parties to this suit at the time of the trial.

The judgment-roll in the case of Herrick & Luhrs against W. A. and Lilly B. Hancock, which was put in evidence by the plaintiff in the present case (37), shows that that action was commenced on September 21, 1885, for the purpose of foreclosing two mortgages on the property now in question, one mortgage having been made by Hancock alone on November 10, 1883, this covering four of the five lots, and the other having been made by Hancock and wife on December 17, 1883, covering all of the lots. In this case the defense set up to the first mortgage was that the property on which it was given, together with the additional lot, constituted the homestead of Hancock, and that therefore the mortgage was void because not signed by Hancock's wife. The plaintiffs replied to this that the one lot not covered by the mortgage was Hancock's homestead, but the lots covered by the mort-

gage were not. This was therefore the precise point in issue in that action, whether these four lots were held by Hancock as his homestead, in addition to the one lot which was admittedly so held by him.

The judgment in that action did not foreclose this mortgage executed by Hancock alone. There can be no question but that this was on the ground that the property was Hancock's homestead, since that was the direct and only point raised in the case. By this judgment it therefore became *res adjudicata* that on November 10, 1883, and on September 21, 1885, this property was the homestead of Hancock.

On this point of *res adjudicata* we desire to call attention to the case of Southern Pacific R'y *vs.* United States, 168 U. S., at pages 48 *et seq.*, where it is said:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

The parties were substantially the same in the former suit as they are in the present case. True, the appellee herein was not a party to that former suit; but his predecessor in interest, Lilly B. Hancock, was, and he, as her privy, is entitled to set that judgment up as *res adjudicata*.

(*c.*) It was legal in Arizona at the time of the deed from Hancock to his wife for a husband to deed a homestead to his wife without his wife signing the deed.

The appellant contends that this deed from Hancock to his wife was void if this property was Hancock's homestead

at the time of that deed, because the deed was not signed by Mrs. Hancock herself; and in this connection appellant quotes the statute of Arizona relating to the transfer of homesteads, which was in force at the time of this conveyance and which reads as follows:

Par. 2141, *Compiled Laws of* 1877.

"* * * no mortgage, sale or alienation of any kind whatever of such land (the homestead) by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband."

Our contention on this matter is that that law was enacted for the benefit of the wife, to prevent the husband from depriving his wife and family of their home, but that the statute was not intended to and does not have any application to the case of a transfer by the husband to the wife herself, as the reason for the enactment of the statute is in that case lacking, and in fact strict compliance with the words of the statute in that case would be in direct violation of the spirit of the statute, which is to, as far as possible, secure the homestead to the wife. This being the case, we do not believe that it should be or will be held that the wife should join in the deed of the homestead to herself.

The following authorities support our view of this matter:

Thompson on Homesteads and Exemptions, section 473:

"The policy of those statutes which restrain the alienation of the homestead without the wife joining in the deed is to protect the wife, and to enable her to protect the family, in the possession and enjoyment of a homestead, after one has been acquired by the husband. They are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance."

In California, from which the Arizona homestead law was taken, the courts have held that the statute requiring that the wife should sign a deed of the homestead did not apply to the case of a deed of the homestead from husband to wife.

Burkett *vs.* Burkett, 78 Cal., 310; 20 Pac., 715:—

"A conveyance by the husband to the wife is valid and passes the complete title to the wife of said homestead, though secs. 1242–1243 provide that an instrument of conveyance of the homestead must be executed and acknowledged by both husband and wife."

In many other States, under similar statutes, it has been held that the husband can convey a homestead to the wife without her joining in the deed.

Stevens *vs.* Castel (Michigan), 29 N. W., 828.
Lynch *vs.* Doran (Michigan), 54 N. W., 882.
Harsh *vs.* Griffin (Iowa), 34 N. W., 441.
Reihl *vs.* Bingenheimer (Wisconsin), 28 Wis., 84.
Ferguson *vs.* Mason (Wisconsin), 60 Wis., 377.
Holmes *vs.* Carley, 31 N. Y., 289.
Furrow *vs.* Athley (Nebraska), 33 N. W., 208.

In the case of Johnson *vs.* Branch (South Dakota), 68 N.W., 173, the court expresses the idea clearly, saying:

"As statutes inhibiting the alienation or encumbrance of the homestead without the concurrent assent of the husband and wife, evidenced by an instrument in writing, executed by both and duly acknowledged, emanate from a regardful consideration of the reciprocal duties, and are designed only to protect the home and family against the vicissitudes of fortune and the ravages of time and events, the spirit of such laws is not contravened by the conveyance direct from the husband to the wife, and it is useless for the husband and wife both to join as grantors in such a deed."

In support of his position, and as opposed to the contention of the appellee, the appellant has cited several cases from Illinois, which hold that under a statute providing

that a husband shall not convey a homestead without his wife joining in the conveyance, the husband cannot even convey to his wife, unless the wife also signs the deed to herself.

The Illinois cases which so hold begin with the case of Kitterlin *vs.* Milwaukee Mechanics' Insurance Company, 134 Ill., 647. It will appear upon an examination of the facts of this case that it was one of those "hard cases" which make "hard decisions." The facts were as follows: The husband insured his homestead, one of the conditions of the policy being that if any change should occur in the title to the property the policy should be void. Some time afterward the husband made a deed of the property to his wife, his wife not joining in the deed. After this conveyance was made, a fire occurred and destroyed the property. The insurance company defended the action on the policy on the ground that the condition of the policy that no change should be made in the title to the property had been violated by the deed from husband to wife. The court, however, in order to sustain the insurance against the company, held that the statute against the conveyance of the homestead by the husband without the wife's joining should be strictly construed to apply to the case, and held the deed void, and the company liable on this ground.

Every similar case since that time in Illinois has referred to this original case and founded its decision on that case on the ground that the law had been settled.

On the contrary, in every other jurisdiction where the question has arisen the contrary idea has prevailed, as shown by the authorities we have quoted above. The decision in the case of Castle *vs.* Palmer (Mass.), 6 Allen, 403, which is cited by the appellant, goes only to the proposition that where the homestead has been deeded by the husband to the wife it does not lose its character of homestead, so as to be subject to execution. None of the other authorities cited by the ap-

pellant have any bearing whatever on the question of a conveyance of a homestead by a husband to his wife.

3. This deed from Hancock to his wife was a valid deed, because it was not in fraud of creditors, because as this property was Hancock's homestead his creditors could have had no recourse against it, even if not transferred by him to his wife; hence they lost nothing by the transfer.

Our contention on this proposition is that as this property was the homestead of Hancock at the time he made the deed to his wife, it would not have been subject to the claim of any of his creditors, and therefore the creditors could not be injured in any way by his transfer of it, and that transfer of the property was not fraudulent.

We have above quoted the homestead law which was in force in this Territory at the time of the conveyance from Hancock to his wife, section 2140, Compiled Laws of 1877, which provides that such property shall be exempt from execution or any liability whatever.

The following authorities hold that the transfer of such exempt property cannot be fraudulent:

Bump on Fraudulent Conveyances, page 242:

"Property which is exempt by positive statute from liability for the owner's debts is not susceptible of a fraudulent alienation, and consequently is not within the statute. The creditors cannot be said to be creditors as to that particular property so as to make a transfer of it a matter of concern to them. The debtor, as to that property, may be considered as without creditors, and he has the right to dispose of it as though he had no creditors. He may sell it and purchase another piece of property with the proceeds and have the latter conveyed to his wife."

Hickson *vs.* George, 18 Kansas, 253:

"A debtor, in the disposition of his property, can commit a fraud upon his creditor only by disposing of such of his property as the creditor has a legal right to look to for his

pay. Now, if George ever had any interest in said property, he disposed of that interest long before he abandoned the property as his homestead by having the absolute and unconditional title thereto placed in his wife's name and having the deed to her for the property recorded. There was no fraud in this."

Other authorities to the same effect are:

Monroe *vs.* May, 9 Kansas, 476.
Dreutzer *vs.* Bell, 11 Wis., 114.
Pike *vs.* Miles, 23 Wis., 164.
Cipperly *vs.* Rhodes, 53 Ill., 346.

In the case of Blair *vs.* Smith, 15 N. E., 817, the court, in discussing this question, says:

"Property exempt from execution is not subject to any claim of the creditor, but is absolutely free from all claims of creditors. No execution or other writ is a lien upon it. The creditor has no claim upon it in any form, and it is impossible to conceive any logical ground upon which property not subject to the claims of creditors can be held to have been fraudulently conveyed."

Taylor *vs.* Duesterberg, 109 Ind., 165; 9 N. E., 907.
Patnode *vs.* Darvau, 71 N. W., 1095 (Mich.).
Bank of Commerce *vs.* N. W. Bank, 67 N. W., 423 (Wisconsin).
Hibben *vs.* Soyer, 33 Wis., 319.
Thompson *vs.* Crane, 73 Fed., 327.
Mundt *vs.* Hagedorn, 68 N. W., 610 (Nebraska).
Munson *vs.* Carter, 58 N. W., 931 (Nebraska).
Merchants' Bank *vs.* Kopplin, 42 Pac., 263 (Kansas).

Exempt property may be transferred by the owner, even as a gift to his wife, free from any claims of his creditors.

Bailey *vs.* Little, 53 Pac., 308 (Nevada).
Waugh *vs.* Bridgeford, 28 N. W., 626.
Robb *vs.* Brewer, 15 N. W., 420.
Isgrigg *vs.* Pauley, 47 N. E., 821 (Indiana).
Bank of Blagden *vs.* David, 74 N. W., 42 (Nebraska).

On principle and authority, it would seem to be clear that this deed from Hancock to his wife was not void as being in fraud of creditors.

Certainly it was admissible in evidence, and that is the only ruling in regard to it which is before this court.

II.

The evidence which was excluded as to an application made by Hancock for a homestead in 1888 *was clearly irrelevant.*

Since the title to the property passed from Hancock to his wife in 1886, so that Hancock had no legal interest in it in 1888, it could make no possible difference what land he was claiming in 1888 or how he was claiming it. Evidence of Hancock's attempting to take out a homestead at the time of the deed to his wife might have been relevant as showing that the property was not his homestead at the time of that conveyance, which was one of the points in issue in the case, but his attempt to claim other lands as a homestead in 1888 can certainly have no bearing on this case, which turned on the question whether Hancock had conveyed the property involved in this suit to his wife in 1886.

The rights of a grantee under a valid deed cannot be impaired by the subsequent declarations or acts of the grantor.

III.

There was no error in refusing to allow the appellant to introduce the evidence which he offered as to the insanity of Hancock's wife.

The offers of the appellant as to proving the insanity of Mrs. Hancock are contained in the certificate of the Arizona supreme court (Transcript, pages 97 and 98). It appears

from this certificate that the appellant offered to prove that on March 23, 1886, and March 21, 1886, Lilly B. Hancock was insane. (See also page 33, Transcript.)

The deed from Hancock to his wife was made on February 26, 1886, almost a month before this time. This testimony would be clearly irrelevant, as far as having any tendency to show that Mrs. Hancock was insane at the time the deed of the property was made to her by her husband. The showing that at one time a status existed will not have any tendency to show that it existed prior to that time; in other words, a presumption is not retrospective.

Jones on Evidence, sec. 54.
Erskine *vs.* Davis, 25 Ill., 228.
Taylor *vs.* Cresswell, 45 Md., 422.
Murdock *vs.* State, 68 Ala., 567.

2. There was no error in rejecting this evidence as to Mrs. Hancock's insanity, because even if she had been insane at the time of the deed to her from her husband, she would have been competent to take that deed, and the deed would have been valid.

The transaction was one beneficial to Mrs. Hancock. Nothing was being taken from her. Can there be any question but that, even if she were insane at the time, the deed to her would be perfectly valid?

Chief Justice Shaw said in the case of Concord Bank against Bellis *et al.*, 10 Cush., 278:

"A good conveyance may be made by deed-poll to an infant, lunatic, or *feme covert*, although such grantee would be under legal disability to make a conveyance."

Wharton on Contracts, vol. 1, p. 139, par. 107*a*:

"'A man of non-sane memory,' it is said by Coke, 'may, without the consent of another, purchase lands;' and 'idiots, madmen, lepers, deaf, dumb, and blind, minors, and all

other reasonable creatures, have power to purchase and retain lands and tenements.' By deed-poll a title can thus be granted to a lunatic."

Campbell *vs.* Kuhn, 45 Mich., 513, is also an authority on this point.

3. There was no error in rejecting this evidence as to Mrs. Hancock's insanity, because, even if the deed to her were not absolutely effectual, it would only be voidable at her option, and not be subject to attack by a third party.

If, for the reason that Mrs. Hancock was insane at the time the deed was made to her by her husband, that deed could be assailed, it could only, and that only at the utmost stretch, be held voidable. The rule is too elementary to require citation of authorities, that a deed given *by* an insane person is not void, but only voidable, and so, *a fortiori*, a deed *to* an insane person at the most could only be held voidable.

Now voidable means that it can be avoided only by the person to whom it is given, or some one standing in his or her shoes. The present case is entirely different; here a third party, who has acquired an alleged claim to the property through another channel, is trying to impeach the conveyance to the alleged insane person, in order to recover in this ejectment suit against the privy and successor of that alleged insane person.

The point we are making is clearly brought out in Dembitz on Land Titles, vol. 1, page 420, as follows:

"The distinction between void and voidable has three consequences: * * * second, parties not claiming under the infant cannot impeach the conveyance (for instance, if the infant's grantee brings ejectment against an intruder, the latter cannot plead an outstanding title in the infant grantor)." (Citing cases.)

Washburn on Real Property, vol. 3, pp. 264, 265 (5th ed.):

"But an infant cannot avoid a deed made by him while he remains an infant, nor can any one but himself or his heirs call the deed in question."

This being the law, this deed from Hancock to his wife can be avoided, if at all, only by Mrs. Hancock.

4. There was no error in rejecting this evidence as to Mrs. Hancock's insanity, because, even if Mrs. Hancock were insane at the time she and her husband executed the mortgage to Alstatter, through the foreclosure of which the appellee has acquired his title, such mortgage could only be overthrown at the option of Mrs. Hancock or her representatives; and it would not be subject to be overthrown, together with the judgment of foreclosure rendered upon it, in this collateral attack on that judgment.

The same reason and authorities apply to this proposition that we have cited under the one immediately preceding. Even if Mrs. Hancock were insane at the time of the execution of the mortgage to Alstatter, under foreclosure of which the appellee claims, the appellant, an outsider, cannot now avoid that mortgage made by Mrs. Hancock; if the mortgage were avoidable at all, it would only be by Mrs. Hancock or some one claiming under her.

Ingraham *vs.* Baldwin, 9 N. Y., 45, is an analogous case. In that case a person in good faith purchased land at a sale under proceedings to foreclose a mortgage, and brought an action for possession against the tenant of the premises who was not the mortgagor; it was held that it was incompetent for the defendant to show that the mortgagor was of unsound mind when the mortgage was executed.

See also Kilbee *vs.* Myrick, 12 Fla., 419.

And for another reason the appellant could not now attempt to show the insanity of Mrs. Hancock for the purpose

of avoiding this mortgage made by her to Alstatter, because this mortgage has been properly foreclosed by suit (Transcript, pages 70 *et seq.*), and the judgment rendered in that suit foreclosing that mortgage cannot be collaterally attacked in this ejectment suit on the ground that Mrs. Hancock was insane.

Van Fleet on Collateral Attack, par. 616.

"Where a judicial record is fair on its face, it cannot be shown, collaterally, that any party was insane at the time the proceeding was commenced or judgment rendered, because that will contradict the record."

If Mrs. Hancock were insane at the time she made the mortgage to Alstatter, she could have disaffirmed it at any time after that. She did not disaffirm it, and suit was brought to foreclose the mortgage, she being a party to the suit and answering therein (Transcript, page 86), admitting the execution of the mortgage. The judgment of foreclosure is clear on its face. It would surely be binding unless Mrs. Hancock were insane during the action and when judgment was rendered, and under the law this cannot be shown by way of collateral attack on that judgment.

Foster *vs.* Jones, 23 Ga., 168.
Speck *vs.* Pullman Car Co., 121 Ill., 33.
Maloney *vs.* Dewey, 127 Ill., 395.
Woods *vs.* Brown, 93 Ind., 164.
Boyer *vs.* Berryman, 123 Ind., 451.
Stigers *vs.* Brent, 50 Md., 214.
Heard *vs.* Sack, 81 Mo., 610.
McCormick *vs.* Paddock, 20 Neb., 486.
Lamprey *vs.* Nudd, 29 N. H., 299.
Brittain *vs.* Mull, 99 N. C., 483.
Henry *vs.* Brothers, 48 Pa. St., 70.
Wood *vs.* Bayard, 63 Pa. St., 320.
Grier's Appeal, 101 Pa. St., 412.
Denni *vs.* Elliott, 00 Tex., 337.

5. There was no error in rejecting this evidence as to Mrs. Hancock's insanity, because even if Mrs. Hancock were insane, and it should be held in this proceeding that the mortgage executed by her to Alstatter was void, the plaintiff could not recover in this case, as, it being an action of ejectment, the plaintiff (never having been in possession) must recover on the strength of his own title, and even if the title should not be in the appellee, it would still be in Mrs. Hancock under the deed to her from her husband, and the appellant, claiming through an execution against the property of the husband alone, could not recover in this action.

The proposition just stated seems self-evident. Even if the appellant could succeed in establishing the fact that the mortgage from Mrs. Hancock to Alstatter was absolutely void, the title to the property would still be left in Mrs. Hancock herself, and we do not see how the appellant, who must recover on the strength of his own title, would be benefited, as he would only have his judgment against Hancock alone, which would not be effective against Mrs. Hancock's property.

We submit that the court made no error in ruling out all the testimony sought to have been introduced by the appellant bearing on the question of the sanity of Mrs. Hancock.

The foregoing, as we conceive, are the only questions properly brought here for review.

There is no other exception certified here as to the rulings of the trial court admitting or excluding evidence. It has not been suggested, and it would seem that it is impossible to suggest, that if the facts be as found by the supreme court of Arizona (99), this appellee, Pemberton, was not entitled to judgment in his favor.

We submit, however, certain other considerations in reply to the brief for the appellant.

IV.

Even if the deed from Hancock to his wife was fraudulent, as charged, it would be only voidable until set aside in a proper proceeding; and if in the meantime, before action had been brought to set it aside, the grantee in the deed had (as in this case) mortgaged the property to a bona fide mortgagee, such bona fide mortgagee would stand prior to any creditor of the fraudulent grantor or purchaser at such creditor's sale, notwithstanding that the judgment might have been standing against the fraudulent grantor at the time of the mortgage to the bona fide mortgagee. On this principle appellee now stands prior to appellant in any event.

We believe that the rule of law is clearly established that where a person has alienated his land by conveyance which is claimed to be a fraud upon his creditors, and afterward a judgment is recovered against him, such judgment does not attach as a lien upon the land until the commencement of an action by the judgment creditor to set aside the conveyance; this being on the ground that the conveyance is not void *ab initio*, but is only voidable, and that it is valid between the parties and as to the judgment creditor until attacked, and if while the property still remains in the hands of the fraudulent grantee, and before any action has been brought to set aside the deed to him, it passes from him into the hands of some *bona fide* purchaser, such *bona fide* purchaser is vested with good title thereto, even as against former creditors, judgment or otherwise, of the fraudulent grantor, as such creditors' judgments would only be a lien on the property from the date of the commencement of an action by them to set aside the deed as fraudulent.

If this is the rule, as we contend, then, even if the deed from Hancock to his wife was fraudulently made, so that

it would, in a proper proceeding, have been set aside, no such proper proceeding to set it aside having been ever brought, it is still valid as to all the world; and the property having passed by virtue of a *bona fide* mortgage, made before execution was levied by appellant on the property, which mortgage was foreclosed and the property sold, from the alleged fraudulent grantee, Mrs. Hancock, to the appellee, the appellee now stands absolutely vested with the prior right to that property.

The statute of Arizona (in force at the time of appellant's recovery of judgment against Hancock) providing on what real estate a judgment shall be a lien reads as follows:

Act 50, *Laws of Arizona of* 1891, *Section* 4.

"Every such judgment, when so docketed (by the clerk of the court) shall, for a period of five years from the date of the rendition thereof, be a lien on the real property in the county where the same is docketed, except the homestead of every person against whom such judgment shall have been rendered and docketed, and which he may have at any time thereafter within said period of five years."

The effect of this statute is to make the docketed judgment a lien on the property of the judgment debtor. Property which he has conveyed away by a deed, valid and binding on himself, cannot be regarded as his property until an action is commenced to annul the deed from him. It is on this theory that the courts have held that the judgment did not become a lien on real property fraudulently conveyed away by a judgment debtor until an action was commenced to set aside the deed.

We would suppose that the same rule would apply to the execution on the property, and that the execution would no more constitute a lien than the judgment until the voidable deed had been attempted to be avoided by the commencement of an action to set it aside; but that is immaterial in

this case, as the mortgage to Alstatter, while made subsequent to the judgment of appellant against Hancock, was made prior to appellant's execution and levy on the property under that judgment.

In the case of *In re* Estes & Carter, 3 Fed. Rep., 134, Judge Deady reviews the authorities pro and con and arrives at the following conclusion:

"In my own opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing does not, nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another, by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee; and a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title."

The case of Milier *vs.* Sherry, 2 Wall., 237, supports the same position, as does also the case of Brooks *vs.* Wilson, 6 N. Y. Supp., 116, where (on page 119) the court says:

"With what propriety can it be said that a judgment debtor 'has' property which he has conveyed away? It is claimed that the statute which avoids conveyances made with intent to defraud creditors rendered the conveyance of Michael K. Wilson, the judgment debtor, a nullity as respects his creditor, and, therefore, that judgments against him become liens on the property conveyed, as if no conveyance had been made. The answer to this argument is that the fraudulent conveyance is not void, but is voidable only, at the election of the creditors defrauded. The fraudulent grantee can transfer the title to the property conveyed to a *bona fide* purchaser, notwithstanding outstanding judgments against the fraudulent grantor docketed before the transfer."

Other authorities to the same effect are:

Bump on Fraudulent Conveyances, sec. 581 (4th ed.).
1 Black on Judgments, sec. 423.
Lyon *vs.* Robbins, 46 Ill., 276.
Rappelye *vs.* International Bank, 93 Ill., 396.
Neil *vs.* Foster, 36 Fed. Rep., 29.
Ackley *vs.* Chamberlain, 16 Cal., 181.
Young *vs.* Lathrop, 12 Am. Rep., 603 (N. Carolina).

This being the law, it follows that the appellant obtained no lien on the property in question at the date of his judgment, to wit, March 5, 1892, and that the appellee has the prior lien on the premises, because the mortgage, under the foreclosure of which he claims, was made March 21, 1892, from which date his lien commences. The appellant has never commenced any action to set aside the deed from Hancock to his wife, so that we do not believe he has ever acquired any lien on the property; but even if by his levy on the property and sale of it he acquired any lien upon it, that levy was not made until April 3, 1892, and is therefore subsequent to the appellee's claim founded on the mortgage of March 21, 1892.

Therefore, even if it should be held that Hancock did not hold this property as his homestead when he conveyed it to his wife, or that for any other reason that conveyance was fraudulent or voidable, nevertheless the appellee clearly has the prior lien on the premises.

V.

Any claim appellant might have is barred by the statute of limitations. (This includes argument on the remaining errors assigned by appellant.)

1. An action of ejectment in Arizona must be brought within three years after the cause of action accrues.

Revised Stats. of Arizona, section 2297:

"Every suit to be instituted to recover real property as against any person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action shall have accrued and not afterward."

2. Appellant's cause of action accrued on January 2, 1893, because a cause of action accrues by virtue of a sheriffs sale on execution when the right to the deed is complete, which in this case was on that date.

The sale to appellant on the execution against Hancock, on which sale appellant obtained his deed to the property, took place on July 2, 1892. The law is that the purchaser at an execution sale is entitled to a deed to the property which he purchases at the expiration of six months from the time of the sale.

Act No. 20, Laws of Arizona of 1889.

"SECTION 22. * * * If no redemption be made within six months after the sale (execution sale), the purchaser or his assignee is entitled to a conveyance."

The appellant was, therefore, entitled to a conveyance of the property on January 2, 1893, six months from the time it was sold to him at the execution sale.

We contend that the law is that the statute of limitations runs from the time the plaintiff has it in his power to make his cause of action complete, and that he cannot voluntarily delay its operation, and so extend the time within which he can sue by neglecting to perfect his right; that the statute runs from the time when he could have perfected his cause of action, irrespective of the time when he does perfect it.

This is the view taken in the case of Cook *vs.* Norton, 48 Ill., 20, which is quoted with approval as to this point in

Pratt *vs.* Pratt, 96 U. S., 709. Another case which takes the same view is Cowles *vs.* Coffey, 88 N. C., 340.

On this principle it has been held that the statute of limitations commenced to run against one claiming under a tax deed from the time when the party holding the deed was entitled to obtain it, and not from the date of the actual execution and delivery of the deed.

Hintrager *vs.* Hennessy, 46 Iowa, 600.

In the case of Hintrager *vs.* Traut, 27 N. W., 807, the holding was the same, and the court said:

"His (the plaintiff's) right was complete to a deed, so far as all acts and proceedings were concerned, except his own act, over which he had no control. The law, as it were, offered him the deed at the time, but he would not stretch forth his hand to receive it. * * * Surely a plaintiff cannot indefinitely prolong the time in which he may sue by voluntarily failing to do the things required by the law to be done before an action may be brought."

The Supreme Court of the United States, in a case which seems analogous to the one at bar in this respect, has stated the same principle, that where the completion of a legal right depends upon some act of a party, that party cannot, by failing to complete his right, suspend the running of the statute of limitations until he has completed it, but the statute will run from the time he could have by the act of his own completed his right.

Kirby *vs.* Lake Shore R'y, 120 U. S., 130.

In that case to perfect the right of action all that was necessary was that a certified copy of letters testamentary issued in another State should have been filed in Illinois. This the plaintiff neglected to do, and on this point the court says:

"* * * a certified copy deposited in the office of the surrogate was all that was required. As this was in the ex-

ecutor's power to have done at any time, he can hardly claim that his own voluntary delay should extend the period which equity considers reasonable for the institution of a suit."

Other authorities on the same point are—

Steele's Administrators *vs.* Steele, 25 Pa. St., 154.
Palmer *vs.* Palmer, 36 Mich., 487.

3. If appellant's cause of action did not accrue on January 2, 1893, it certainly did accrue when the appellant took his deed from Sheriff Murphy, which was on January 4, 1893.

(*a.*) This is so, because Murphy, the sheriff then in office, was the proper officer to make the deed. Hence there was no error in admitting this deed in evidence, as it tended to show when the appellant's cause of action accrued.

Murphy was the sheriff who was in office at the time the deed was due to the appellant, he having succeeded Montgomery, who was the sheriff who made the sale to appellant.

We believe that under the statutes of Arizona the sheriff in office at the time the deed is due to the party holding the certificate of sale is the proper officer to execute the deed on that certificate, and that the outgoing sheriff's right to execute the deed ceases with his relinquishment of the office.

We are aware that the California supreme court, in the case of People *vs.* Boring, 8 Cal., 407, has held that the former sheriff should make deed to the property sold by him; but that opinion is founded expressly upon a California statute, to which Judge Field, in rendering the opinion of the court, thus calls attention:

"The fifth subdivision of section 37 of the act concerning sheriffs, requires, on the election of a new sheriff, the former sheriff to deliver over to his successor all executions, attachments and final process, except those which he has executed or begun to execute by the collection of money or a levy on property; and the 39th section of the same act provides,

that, notwithstanding the election and qualification of the new sheriff, the former sheriff shall complete the execution of all final process which he began to execute."

A very similar statute was in force in this Territory up to 1887, when it was repealed; that statute read as follows:

Compiled Laws of 1877, *Section* 93, *Page* 47.

"Notwithstanding the election of a new sheriff, the former sheriff shall return, in his own name, all writs of capias, all other original process, all attachments, and all executions which he shall have fully executed; and shall proceed to complete the execution of all final process and attachments which he shall have begun to execute by a collection of money thereon, or by a levy on property in pursuance thereof."

This statute was, however, as stated, repealed in 1887; and in the latter year the legislature passed a law relating to all county officers, including sheriffs, and providing as follows:

Revised Statutes of Arizona 1887, *Section* 487.

"In case of the death, resignation or removal of any officer, leaving unperformed any duty imposed by law, it shall be the duty of his successor in office to do and perform such act, and to complete all unfinished business."

We contend that it was the object and intention of the legislature in passing this statute (and repealing the other) to transfer the authority to transact all unfinished official business to the successor in office.

Under a similar statute in South Carolina, the supreme court of that State, in the case of Martin *vs.* Wilbourne, 2 Hill, 395; 27 Am. Dec., 393, in construing the statute, which used the words "or be removed from office," which correspond to the words in the Arizona statute quoted above, "or

removal of any officer," held that such a statute applied to an officer who had been removed from office and to an officer whose term of office had expired by operation of law. The court said on this point:

"The principal reason is that the necessity and propriety of the provision exist in the case of a sheriff's going out of office by the expiration of his term in as great a degree, and indeed in a much greater one, than when he is removed on impeachment or resigns. * * * If there was any incapacity in the sheriff to convey when he was removed on impeachment, or at all events when he had resigned, or any inconvenience in requiring or permitting him to do so, the same incapacity or inconvenience existed when he was out of office by the expiration of his term; and the necessity of legislative interference existed in a much greater degree, as it was a case of much more frequent occurrence. When the terms of the act may be made to embrace both the greater and lesser evil, should we be justified in restricting it to the latter?"

We contend that the same reasonable construction should be placed on the Arizona statute, and that under it Sheriff Murphy was the proper officer to execute the deed to the appellant on his certificate of sale made to him by the former sheriff, Montgomery.

In the State of Oregon, where, so far as we are able to ascertain, there is no statute on the subject, one way or the other, the supreme court has held that the sheriff in office at the time the certificate is produced and the deed demanded is the proper officer to make the deed, and not the one whose term of office has expired, although he may have made the sale before his office expired.

Moore *vs.* Locks Co., 7 Oregon, 359.
Faull *vs.* Cooke, 26 Pac., 662.

At common law there was no right of redemption from a sheriff's sale. The deed passed at once. But where, as in Arizona, there is by statute a period of six months for re-

demption from such a sale, we can see no reason why the sheriff who made the sale and has since gone out of office should make the deed, particularly in view of the statute of Arizona requiring all officers to complete all unfinished business of their predecessor in office.

We submit, therefore, that the deed from Murphy to appellant was properly admitted in evidence, and that the statute of limitations surely began to run against the appellant on January 4, 1893, if not on January 2, 1893.

(*b.*) But, further, appellant's cause of action accrued on January 4, 1893, even if Murphy were not the proper officer to give the deed and the former sheriff was.

We maintain this proposition on the ground of reason. Appellant took his deed from Murphy on January 4, 1893, had it recorded the same day, and showed that he relied on this deed at that time as establishing his title. Appellant's mistake of law at that time, if it was a mistake, in taking the deed from Murphy, instead of from the former sheriff, should not be allowed to postpone the running of the statute until such time as he did take a deed from the former sheriff, to the prejudice of the appellee.

Suppose the appellant had not taken the deed from the former sheriff until the three years from the date of his taking his first deed from Murphy had almost expired, would the statute have then only commenced to run from the latter date? We do not believe such to be the just or the legal rule.

We submit, therefore, that appellant's cause of action accrued to him on January 4, 1893, if it did not accrue on January 2.

4. Appellee was in peaceable and adverse possession of the property in dispute under title or color of title for more than three years after the appellant's cause of action accrued—*i. e.*,

either January 2 or January 4, 1893—and prior to the institution of this suit by the appellant, to wit, February 1, 1896.

As appears from the record in the case, Mrs. Hancock, who had title or color of title to the property by virtue of the deed to it from her husband, which had been recorded, as required by law, to become notice to the world of her title, and was in possession of the property continuously from January 2, 1893, up to March 5, 1896, when the appellee was put in possession by virtue of his deed to the property made in pursuance of the sale of the property to him on the foreclosure of the Alstatter mortgage. The appellee has, therefore, a privity of estate with Mrs. Hancock, being her successor in interest. We claim that this possession for this period by Mrs. Hancock and the appellee is such adverse possession as is contemplated by the statute which we have above quoted, and that any claim appellant might have had is therefore barred.

The whole argument of appellant on this point is directed to the proposition that the person in possession of the land during this period of time was Hancock and not Mrs. Hancock.

Hancock had deeded the property to his wife, and the deed had been duly recorded. The rule is that where a husband conveys land to his wife by a valid deed as between the parties, which has been duly recorded, and both parties continue to reside on the land, the possession is that of the wife and not that of the husband.

Reagle *vs.* Reagle (Penn.), 36 Atlantic, 191.

"The deed (from husband to wife), when recorded, was notice of her title, and thenceforth the possession of the land was as effectually hers as if she had owned it when they entered and made their home upon it."

There can be, it seems to us, no doubt that Mrs. Hancock was in possession of this property, and that the possession was not that of her husband.

On the theory that Hancock was in possession of the property and not Mrs. Hancock, appellant argues that Hancock's possession after the sale to appellant was not adverse to appellant for the reason that the possession of a judgment debtor is not adverse to the purchaser at an execution sale.

Even supposing the possession was Hancock's, the appellant's case must fail.

In support of his contention he has cited the case of Cook *vs.* Norton, 48 Ill., 22. Upon an examination of that case, it will be seen that on this point it merely contains certain *dicta*, and not a decision. It was said in that case that a debtor could no more claim adverse possession against the purchaser at a sale on execution than he could against his grantee. Conceding this to be true, we think the rule is that a grantor who conveys land by warranty deed may take adverse possession of the property conveyed as against his grantee.

Garabaldi *vs.* Shattuck, 11 Pac., 778:

"There can be no doubt that a grantor, even with a covenant of warranty, may, after his deed is delivered, take adverse possession of the property conveyed, and if his possession is allowed to continue during the period prescribed by the statute of limitations, obtain a title as against his grantee."

To the same effect are—

Franklin *vs.* Dorland, 28 Cal., 180.
Sherman *vs.* Kane, 86 N. Y., 57.
Traip *vs.* Traip, 57 Me., 268.
Dorland *vs.* Magilton, 47 Cal., 485.

Even if the possession from January 2 or January 4, 1893, the date of the accruing of plaintiff's cause of action, to

February 1, 1896, when he brought this action, was in Han
cock himself, we believe that the appellant's cause of actio
would be barred by the statute of limitations.

We submit that the judgment of the supreme court o
Arizona should be affirmed.

A. S. WORTHINGTON,

C. F. AINSWORTH,

Attorneys for Appellee, Thomas W. Pemberton.

Supreme Court of the United States.

No. 176.—October Term, 1900.

George H. N. Luhrs, Appellant,
vs.
William A. Hancock, Lilly B. Hancock, and Thomas W. Pemberton.

Appeal from the Supreme Court of the Territory of Arizona.

[May 13, 1901.]

Mr. Justice McKenna delivered the opinion of the Court.

This is an appeal from the judgment of the Supreme Court of Arizona, affirming the judgment of the district court of the third judicial district of the Territory, rendered in an action of ejectment originally brought against Hancock and his wife, and to which action Pemberton was afterwards made a party.

The facts as found by the Supreme Court are as follows:

"This was an action by the appellant to recover possession of five certain lots in the city of Phœnix, and for the value of the rents and profits thereof. The complaint is in the usual form in ejectment cases. The defendants William A. Hancock and Lilly B. Hancock, husband and wife, answered, pleading 'not guilty,' and setting up the statute of limitations in bar of the plaintiff's right to recover. Similar defenses were imposed by the defendant Thomas W. Pemberton, who, by way of cross-complaint, also pleaded his ownership and possession of said premises, and asked for affirmative relief as against the adverse claims of the plaintiff. Upon the trial in the court below the plaintiff was adjudged to have no right, title or interest in said property, and the defendant Pemberton was adjudged to be the owner and entitled to the possession thereof. From this judgment of the district court the plaintiff prosecutes an appeal.

"The record shows the material facts in the case to be substantially as follows: On February 27, 1886, the legal title to the premises in controversy was vested in William A. Hancock, the common source from which both the plaintiff and the defendant Pemberton deraign title. The said premises were inclosed as one tract, with a dwelling house situated upon lots 14 and 15, and had been occupied by the defendants William A. Hancock and Lilly B. Hancock as a homestead ever since 1873. On the said 27th day of February, 1886, and while the said premises were so occupied and claimed as a homestead, the said William A. Hancock, for the consideration of love and affection, deeded the same by a direct conveyance to his said wife, Lilly B. Hancock. The value of the said property so conveyed did not at that time exceed the sum of $4,000. On March 5, 1892, certain creditors (Herrick & Luhrs) obtained a judgment in the district court of Maricopa County against the said William A. Hancock for the sum of $2,524.02 upon an indebtedness contracted by him November 1, 1883. An execution was issued upon said judgment April 5, 1892, and the same was levied upon the premises here in controversy as the

property of William A. Hancock. No proceeding was had to set aside the anterior conveyance to his wife, but the said real estate was formally sold under said execution to the plaintiff George H. N. Luhrs, to whom a sheriff's deed was made on February 4, 1893, conveying the title which is the basis of his ejectment suit. On March 21, 1892, the said Lilly B. Hancock and William A. Hancock had borrowed from one Robert Allstatter the sum of $2,600, and on the same day, to secure the payment thereof, had executed to the said Allstatter a mortgage upon all of the aforesaid premises. This mortgage, presumably executed in good faith, was subsequently foreclosed, and the defendant Thomas W. Pemberton became the purchaser at the foreclosure sale. He received the sheriff's deed for the said premises on February 14, 1895, took possession thereof from the Hancocks, and has since paid the taxes and made valuable improvements upon the property. The plaintiff Luhrs was never in the possession of the premises."

The Supreme Court also certified that the exceptions on the trial to the rulings of the court were (1) to the admission of the deed dated February 27, 1886, from Hancock to his wife; (2) the rejection of evidence tending to prove that Hancock made an application for a homestead under the public land laws of the United States, and filed an application in the land office of Tucson, completed his homestead proofs and received a certificate from the receiver for the land applied for. A certified copy of the papers was offered in evidence, but ruled out. (3) The rejection of evidence of the insanity of Mrs. Hancock at the time she executed the mortgage to Robert Allstatter, the foundation of Pemberton's title. (4) The admission in evidence of the note and mortgage over the objection of plaintiff claiming Mrs. Hancock insane and incompetent to make them.

We are confined to the assignment of errors based on these rulings. (*Harrison* v. *Perea*, 168 U. S. 311; *Halloway* v. *Dunham*, 170 U. S. 615; *Young* v. *Amy*, 171 U. S. 179; 18 State, 27.)

(1.) The ground of objection to the deed is that it is void as a conveyance because void at common law, void under the statute restricting the conveyance of homesteads, and void because a fraud upon creditors, "and especially the plaintiff whose debt against Hancock then existed."

It is conceded that part of the property was a homestead in 1883 at the time of the commencement of the suit by Herrick and Luhrs, but that before judgment the homestead had ceased to exist, because, under the statute of the Territory passed March 10, 1887, a declaration in writing was necessary to be filed and recorded in the office of the county recorder to preserve the homestead exemption. In other words, it is conceded that the property was a homestead when Hancock executed the deed to his wife in 1886, but, it is claimed, that the deed being void and the property ceasing to be a homestead in 1889, it became subject to his debts.

Two questions arise: The validity of the deed, and the continuance of the homestead. We need not now express an opinion as to the latter. The

former should be answered in the affirmative. The contention is that the deed was void because it was made directly by Hancock to his wife without the intervention of a trustee, and the contention is claimed to be supported by act No. 68 of the laws of the Territory. That act provided as follows:

"The common law of England so far as it is consistent with and adapted to the natural and physical condition of this Territory and the necessities of the people thereof, and not repugnant to, or inconsistent with, the Constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all the courts of the Territory."

It will be observed not the common law unqualifiedly was made the rule of decision, but that law as modified by the conditions of the territory, and changes in the common law relation between husband and wife had been expressed in the statutes prior to the passage of the act of 1885. A community of property of the marriage was provided for; each of the spouses could have separate property, and of hers she had the absolute disposition. The separate legal individuality of the wife, therefore, was recognized, and the doctrine which confounded her being with that of her husband was abolished. The conditions had passed away which caused it to exist. New and more natural conditions had arisen, and the act of 1885 adopted the common law only so far as it suited to those conditions. This was the view of the Supreme Court of the Territory and we adopt it. That learned court could certainly know what the natural conditions of the Territory and the necessities of its people were, and how far consistent with them the laws of a past time were.

Indeed the modification of the common law as to the property relations of husband and wife generally in this country was expressed by this court in *Jones* v. *Clifton*, (101 U. S. 225.) In that case the assignee in bankruptcy brought suit to set aside two deeds made by Clifton to his wife, executed, as it was contended, to defraud creditors. They were asserted to be void for the reason, among others, "because made directly to his wife, without the intervention of a trustee, and so passed no interest to her." To the contention it was replied that the deeds were voluntary settlements upon his wife. "And," Mr. Justice Field said, speaking for the court, "it cannot make any difference through what channels the property passes to the party to be benefited or to his or her trustee—whether it be by direct conveyance from the husband or through the intervention of others. The technical reasons of the common law arising from the unity of husband and wife, which would prevent a direct conveyance of the property from him to her for a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her. The intervention of trustees, in order that the property conveyed may be held as her separate estate beyond the control

or interference of her husband, though formerly held to be indispensable, is no longer required." This doctrine applies to a homestead as well as other real estate, unless the laws of the Territory prescribe the form or put limits upon the alienation of a homestead. It is claimed that the law does, and paragraph 2141 of the Compiled Laws of 1887 is cited. The paragraph is as follows: ". . . no mortgage, sale or alienation of any kind whatever of such land (the homestead) by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband."

A statute similar to that of Arizona came up for construction in *Burkett* v. *Burkett*, (78 Cal. 310,) and, following the principle of other cases in the same court and cases in other States, it was held that the object of homestead laws was to protect the wife and through her the family, and that a conveyance of the homestead by the husband to the wife was not forbidden by the statute, and was therefore valid. The following cases were cited: *Spoon* v. *Van Fossen*, (53 Iowa, 494;) *Green* v. *Farrar*, (53 Iowa, 426;) Thompson on Homesteads, sec. 473; Platt on Rights of Married Women, sec. 70, p. 225; *Richl* v. *Bingenheimer*, (28 Wis. 86;) *Baines* v. *Baker*, (60 Tex. 140;) *Ruohs* v. *Hooke*, (3 Lea, 302; 31 Am. Rep. 642;) *Harsh* v. *Griffin*, (72 Iowa, 608.)

But independent of other cases, the court said it would not "hesitate to hold such conveyances valid," and disregarded as unimportant the differences which were pointed out between the statutes of the States whose decisions were cited and the statute of California.

The contrary has been held by the Supreme Court of Illinois in *Kitterlin* v. *Milwaukee Ins. Co.*, (134 Ill. 647,) but the reasoning of the other cases we think is the better, and besides their number is not without weight.

The Supreme Court of California held, as the Supreme Court of Arizona held in the case at bar, that by a conveyance of the husband to the wife the property did not lose its homestead character. As the title certainly passed, that is unimportant; and equally unimportant whether the homestead was or was not divested by the act of 1887, in the view we take of the effect of appellant's judgment against Hancock. It cannot prevail against the mortgage of Allstatter unless it became a lien upon the land covered by the homestead. It is so contended but unjustifiably. The deed from Hancock to his wife was prior to the judgment. The mortgage to Allstatter was subsequent to the judgment but prior to the levy of the execution, and the latter can only relate to and be supported by the judgment, if the judgment became a lien upon the property. It has been held in some jurisdictions that a judgment against a debtor becomes a lien on land fraudulently conveyed by him. In other jurisdictions it has been held otherwise, and this court has held otherwise. *Miller* v. *Sherry*, (2 Wall. 237,) was a creditor's bill to set aside fraudulent convey-

ances, and a question arose as to the effect of the judgment upon land previously conveyed. The court said: "The judgment obtained by Mills and Bliss was the elder one, but it was subsequent to the conveyance from Miller to Williams. It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law."

The rule and the reason for it are admirably expressed by Judge Deady in *In re Estes*, (3 Fed. Rep. 127,) as follows:

"In my opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing does not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another by a deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all of the estate of the grantor to the grantee; and a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, 'utterly void,' but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a *bona fide* purchaser. The operation of a lien of a judgment, being limited by statute to the property then belonging to the judgment debtor, is not a mode prescribed by which a creditor may attack a conveyance fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy or any other act directed against this specific property. It is the creature of the statute, and cannot have effect beyond it."

(2.) The assignment of error based on the ruling of the court in rejecting evidence of an application by Hancock to enter a homestead under the public land laws is disposed of by the views expressed above. As the title passed to Mrs. Hancock by the deed to her from her husband, and from them to Pemberton through the mortgage executed to Allstatter, it is not necessary to consider, as we have said, whether the property continued or ceased to be a homestead.

(3.) The third and fourth exceptions to testimony were based on the alleged insanity of Mrs. Hancock when she executed the note and mortgage to Allstatter. But we do not think that inquiry was open to the appellant. The deed of an insane person is not absolutely void: it is only voidable; that is, it may be confirmed or set aside. (159 U. S. at 547.) Besides, the title of Pemberton, one of the defendants in error, comes through a judgment against Mrs. Hancock, and that cannot be attacked collaterally. (*Ingraham* v. *Baldwin*, 9 N. Y. 45; *Kilbee* v. *Myrick*, 12 Fla. 419; *Foster* v. *Jones*, 23 Ga. 168; *Speck* v. *Pullman Car Co.*, 121 Ill. 33; *Maloney* v.

Dewey, 127 Ill. 395; *Woods* v. *Brown*, 93 Ind. 164; *Boyer* v. *Berryman*, 123 Ind. 451; *Stigers* v. *Brent*, 50 Md. 214; *Heard* v. *Sack*, 81 Mo. 610; *McCormick* v. *Paddock*, 20 Neb. 486; *Lamprey* v. *Nudd*, 29 N. H. 299; *Brittain* v. *Mull*, 99 N. C. 483; *Henry* v. *Brothers*, 48 Pa. St. 70; *Wood* v. *Bayard*, 63 Pa. St. 320; *Grier's Appeal*, 101 Pa. St. 412; *Denni* v. *Elliott*, 60 Tex. 337.)

The other questions discussed by counsel we do not think it is necessary to consider.

Judgment affirmed.

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Test:

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